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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE BORDEN COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on December 4, 1964.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 19–30) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98–128)[1] is not yet officially reported. The initial decision and order of the hearing examiner are printed at R. 13–97.

[1] "R." refers to the printed record in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (App. B, *infra*, p. 31). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain kinds of discrimination in price involving "commodities of like grade and quality". The question presented is whether products identical in all other respects become of different "grade and quality" when sold under a private brand name instead of the manufacturer's advertised name and label.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where

> the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging the respondent with price discrimination in selling evaporated milk in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private brand labels at lower prices than it sold its "Borden" brand milk; and that the effect of such price discriminations may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1–5).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98–128).[2] Following its prior decisions that "goods which are the same in all respects except labels are * * * goods of like grade and quality" (R. 101–102), the Commission ruled that since the Borden brand and the private brands of evaporated milk were

[2] Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

"physically * * * alike" (R. 100–101),[3] they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials constituted "discrimination" (R. 105–106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106–120), and that they were not cost justified (R. 126).[4]

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved

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[3] The Commission found (R. 79–80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

[4] The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21–22, 31). He further held, however, that the discriminations did not result in competitive injury at either line of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76–96).

in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107–108); that because of the competitive situation between respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially-lower-priced private brand if it had been made available to them; and that, because of "the extremely low or nonexistent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116–120; see R. 741–743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (App. A, *infra*, pp. 22, 23). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (*id.*, pp. 22, 24). It ruled (*id.*, p. 26) that "[i]n determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name" (*id.*, p. 28). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (*id.*, p. 30). By the same token, only that single statutory question is presented here.

REASONS FOR GRANTING THE WRIT

This case presents an important question of statutory interpretation involving the authority of the Federal Trade Commission to deal with price discriminations resulting from the sale of the same product under different labels to different customers at different prices. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits certain price discrimination between different purchasers of "commodities of like grade and quality." The court of appeals held that physically-identical commodities cease to be of "like grade and quality" if the seller can obtain a higher price when it markets them under its own brand than when it sells them under private brand names. This interpretation of the statute distorts the meaning and intent of its language, is contradicted by its legislative history, and is contrary to the agency's settled administrative interpretation. It would seriously handicap the Commission in enforcing the statute against one of the major evils which Congress sought to reach. In the circumstances, review by this Court is required.

1. (a) As a matter of simple English usage, the "grade and quality" of a commodity refer to its physical and chemical properties, not to the price at which it is sold. While consumer preference may increase the importance of only slight differences in grade and quality, it cannot create such differences when the grade and quality are in fact identical. Two cans of

milk containing the identical product are of like grade and quality regardless of what labels they bear or how much consumers are willing to pay for them.

(b) That Congress used the words "like grade and quality" with their normal reference to the physical characteristics of goods, and not their selling price, is confirmed by the basic purpose and plan of the statute, and also its legislative history. "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained *discriminatory preferences* over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168, emphasis added). "[D]iscrimination in price" means "selling *the same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 721, emphasis added). The obvious purpose of the "like grade and quality" requirement was to make it clear that a seller still retained the right to charge different prices for different products.

Sellers traditionally have attempted to persuade customers to pay more for a different product because it is better, *i.e.*, because it has qualities or characteristics that make it superior and therefore worth more. As a corollary, products that do not have those alleged advantages frequently are sold for less. Permitting a seller to give a lower price on a different product—one that was not of "like grade and quality"—did not

pose any threat to competitive injury which concerned Congress. What Congress was worried about in 1936 was the injury to competition that resulted when large buyers, principally the chain stores, paid less for the same product than their small competitors. For such preferences could give the large buyer a decisive advantage in selling the product in competition with smaller stores that did not receive such favored treatment. But in dealing with that problem, Congress explicitly did not prohibit a seller from charging less for a different product; it barred only discriminations in price with respect to "commodities of like grade and quality."

(c) The legislative history shows that Congress was aware of the use by chain stores of private brands as a means of gaining an unfair competitive advantage, and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under the same brand or under different brands. Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were "of like grade and quality" (80 Cong. Rec. 8115, emphasis added):

> Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for

> particular chain stores. Is there anything in this bill calculated to remedy that situation?
>
> Mr. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package,* and this will remedy the situation to which the gentleman refers.
>
> Mr. TAYLOR of South Carolina. *Irrespective of the brand.*
>
> Mr. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra,* 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.,* 2d sess., at 469):

> To amend the bill by inserting "and brands", after the words "commodities of like grade and quality", as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same

brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report cited with approval the Commission's decision in *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears Roebuck & Co. under the latter's private brands the same tires that it sold at higher prices under its own brands. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4; and see the numerous references to the *Goodyear* case during the hearings (House Hearings, *supra,* pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to

the Robinson-Patman Act,[5] the earlier statute had a similar provision relating to "grade" and "quality," and in approving the case the Committee obviously meant to make it clear that commodities that were otherwise of "like grade and quality" did not cease to be so because the manufacturer sold them at a higher price under its own brand than under private brands.

(d) The holding below that physically-identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administrative interpretation. The Commission repeatedly has treated physically identical goods as of "like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973–975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 46 F.T.C. 998; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see, also, *The Goodyear Tire & Rubber Co., supra.* "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391;

[5] In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

see *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549).[6]

The court of appeals, although recognizing that these Commission decisions "all treated goods of differing brands as being of like grade and quality," distinguished them on the following ground (App. A, *infra*, p. 27):

> * * * In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it im-

[6] The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report, p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463–464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424–428 (1963). Contra, Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

> parted a premium market value to the Borden product which the private label product did not enjoy.

This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that nationally advertised brands of vodka and whiskey were of "like grade and quality" with the same liquors that were sold under private labels.[7]

But if, as we have shown, the statutory standard of "like grade and quality" refers to the organic properties of a product and not to the brands or labels under which it is sold, it is immaterial whether a particular brand name is of "commercial significance" in the sense that consumers are willing to pay more for it than for another brand. Goods that in fact are of "like grade and quality" even though sold under different brands do not cease to be alike because the particular brand has been so effectively advertised and promoted that it can command a higher price in the marketplace. In short, in determining whether commodities are of "like grade and quality," the inquiry is whether the two products are physically and organically the same, not whether they are sold at different prices.

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[7] The court stated (App. A, *infra*, p. 26) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * * In this case, the brand name had commercial significance."

(e) The court of appeals also concluded (App. A, *infra*, pp. 28–30) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides. The latter section permits a seller to rebut a *prima facie* case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is not "meeting" but rather is "beating" his competitor's price. See, *e.g.*, *Anheuser-Busch, Inc.*, 54 F.T.C. 277.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand, and the offer of the latter at its usual lower price cannot be viewed as a competitive threat to the market of the premium brand. But to recognize that the existence of a consumer prefer-

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ence for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section 2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."

2. The decision of the court of appeals, if allowed to stand, will seriously handicap the Commission in enforcing the statute. For the effect of the holding below that identical goods cease to be of "like grade and quality" if part of them are sold under a particular brand name that has "commercial significance" (App. A, *infra,* p. 27) in the sense that customers will pay more for the brand, is to insulate from the statute's prohibitions a vast category of price discriminations in favor of the large chain stores that market their own private brands. As we have noted (*supra,* pp. 9–12), Congress was aware that price discriminations based on private brands were a means by which large purchasers could and did gain a significant advantage over their smaller competitors. The decision below, however, makes the statute inapplicable as a matter of law to most of those discriminations, and without regard to how serious a threat to competition they may pose.[8] A decision with such far-reaching consequences should be reviewed by this Court.

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[8] One trade publication has described the legal consequences of the court of appeals' decision as "revolutionary." 35 *Advertising Age*, December 21, 1964, pp. 1, 16.

3. As the case comes to this Court, it does not require consideration or determination of the broader issue of the circumstances under which Section 2(a) prohibits a seller from charging less for the same goods when sold under a private brand than under its own brand name.[9] We are requesting the Court to review only the court of appeals' ruling on the "like grade and quality" issue—a ruling which removes the entire subject matter from the Commission's jurisdiction and which properly may be reviewed without inquiry into those broader issues. The resolution of the latter turns upon the questions which the court of appeals did not reach, *i.e.*, whether the price discriminations had the requisite anticompetitive effect, and, if so, whether they were cost justified. If the Court grants the petition and reverses the ruling below on the threshold statutory question, it will be necessary to remand the case to the court of appeals for it to decide the remaining issues, as in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

[9] We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

CONCLUSION

The decision below is inconsistent with the words of the statute, the legislative history and the long-standing administrative construction of the Federal Trade Commission, and presents a novel question of statutory construction which is of general public importance. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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MAY 1965.

APPENDIX A

[Federal Trade Commission Docket 7129]

In the United States Court of Appeals for the Fifth Circuit

No. 20463

THE BORDEN COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Trade Commission

(December 4, 1964)

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

HUTCHESON, Circuit Judge: This is a petition by the Borden Company to review and set aside a cease and desist order of the Federal Trade Commission[1] based upon its decision that Borden had violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), the pertinent portion of which provides:

[1] The Commission, with two members not participating and one member dissenting, entered its order with the concurrence of two of its five members.

> "It shall be unlawful * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *"

The challenged order is based on the Commission's decision that Borden violated Section 2(a) by discriminating in price between purchasers of its private label evaporated milk, sold under brand labels owned by the customer, and purchasers of its Borden brand evaporated milk.

The Borden Company is engaged in the manufacture, processing, distribution and sale of food, dairy and chemical products. Since about 1938 it has been selling both Borden brand and private label evaporated milk. (The use of the term "milk" in this opinion is intended to refer only to evaporated milk.) The Borden brand, like the Carnation and Pet brands, was sold on a delivered price basis which was uniform throughout the country. The private label milk was sold by Borden on an f.o.b. plant basis, with prices determined under a cost-plus formula. In 1956 and 1957 Petitioner expanded its private label operations to its two southern plants, located at Lewisburg, Tennessee, and Chester, South Carolina, which had not previously packed private label milk. As a result of these new operations some private label business

which had been served by other packers shifted to Borden. This litigation ensued.

Borden has always sold its private label evaporated milk at lower prices than its Borden brand evaporated milk. The record indicates that it made no general offer to sell private label milk, nor did it solicit such orders. The customers who were supplied with the private label product approached Borden and asked it to make the private label milk available in addition to the Borden brand. These customers all continue to buy and stock the Borden brand along with their own private label brand. The private label milk which Borden sells is chemically identical to Borden brand and is packed in the same way except that private brand labels belonging to the customer are put on the cans instead of the Borden brand labels. The private label milk is sold f.o.b. at a price determined by a cost-plus formula through which Borden adds a margin of profit to the actual cost of producing the milk at the particular plant from which it is shipped. The private label price varies from plant to plant and from month to month at each plant, but is always substantially lower than the Borden brand price which is uniform throughout the country. It is this difference in price between Borden brand milk and private label milk that the Commission attacks as price discrimination.

The Hearing Examiner found Borden had discriminated in price between purchasers of the Borden brand and private label milk and that such products were of like grade and quality, but he found that this practice had not injured competition and that it was not likely to injure competition, and that, in any event, the difference in price had been cost justified. He ordered the complaint dismissed, but the Commission reversed the Examiner and found potential in-

jury in both the primary and secondary lines of competition and rejected Borden's cost justification defense. It ordered Petitioner to cease and desist from discriminating in price between competing purchasers of food products of like grade and quality.

Our initial determination must necessarily be whether or not the Commission applied the correct legal test in deciding that the commodities sold at different prices were of "like grade and quality". The facts on this element of the case are undisputed. The question is purely one of law, turning on the proper construction of the statutory phrase "of like grade and quality". If the products were not of like grade and quality, within the meaning of the Act, then their sale does not fall within the prohibition of Section 2(a). It is vigorously asserted by the Petitioner that Borden brand evaporated milk and the private label evaporated milk sold by Borden are not "commodities of like grade and quality".

The Commission's finding that Borden brand evaporated milk and the private label milk produced and sold by Borden are of like grade and quality is based on the undisputed fact that the chemical content of the products is identical. They are packed exactly the same except that the private label milk does not bear the Borden brand label. The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show that the milk was packed or in any manner handled by Borden. Under the construction of the Act adopted here by the Commission the "like grade and quality" determination was based solely on the physical properties of the products without regard to the brand names they bear or the relative public acceptance enjoyed by each.

Borden contends that the grade and quality of products may vary either because of differences in "intrinsic superior quality" or because of "intense public demand" for one product as compared with another. It asserts that a sharp distinction between premium and non-premium products prevails in the evaporated milk business and that there are three well-known premium brands (Carnation, Pet, and Borden) which customarily command a substantially higher price than the other brands. It contends that private label milk, regardless of who packs it, must be sold at lower prices. Petitioner says the higher price commanded by Borden brand at all levels of distribution is due to the "intense public demand" for the product rather than to any "intrinsic superior quality". Borden puts the same milk in the private label cans as in the Borden brand cans. Chemically, the two products are the same, but Petitioner asserts, commercially, they are quite different. One is a premium product, the other non-premium, Borden contends, and they should be priced accordingly.

The record clearly establishes that Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution. Customers at the retail level are willing to pay more for it than for private label because of the Borden name.[9]

[9] For example, one retail grocer testified as follows:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them won't want anything except Pet.

"Q. They don't care what price——

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

The wholesalers who testified recognized that private label milk customarily sells at prices substantially below the premium price commanded by Borden brand milk and the other nationally advertised brands.[3] That the Borden brand is recognized at the manufacturer's level as a premium product is illustrated by the fact that the wholesalers and retailers who bought private label milk from Borden at the lower prices nevertheless kept right on buying Borden brand, at the higher price, in approximately the same quantities. They, in effect, treated one as a premium line, the other as non-premium, recognizing that the Borden brand milk would command a higher price on resale than would the private label milk.

The basic issue presented here then is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the "like grade and quality" determination. The legislative history of the Act is of little assistance on this point. The members of the Attorney General's National Committee to Study the Antitrust Laws were divided on the question,[4]

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[3] As one wholesaler put it, "Private label merchandise is no good for nobody unless there is a price on it. * * * In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] * * * frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. * * * It has got to have $1.50 or $2 a case spread to make it interesting."

[4] The majority of the Committee recommended that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test, but should be taken into account in the injury to competition and cost justification provisions of the statute. The minority of the Committee urged that "significant consumer preferences" be taken into account under the like grade and quality provision, treating demon-

as are the antitrust commentators.[5] We find no case which controls our disposition of this issue.

In construing the Robinson-Patman Act we are mindful of the language of the Supreme Court in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 (1953). The court there said the Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so to avoid "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation".[6] Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity, in conflict with the realities of the marketplace and congressional antitrust policies. An established brand name may have a large following among purchasers. This fact can be of great economic significance in a competitive market. We do not believe it was the intention of Congress that such clearly demonstrable consumer preferences should simply be ignored in determining when products may be priced differently. As a practical matter, such preferences may be far more significant in determining the market value of a product than are its physical characteristics. It is both proper and consist-

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strable economic differences as calling for evaluation under "grade" as distinct from any purely physical consideration of "quality". Report of the Attorney General's National Committee to Study the Antitrust Laws 158–159 (1955).

[5] In accord with the view of the majority of the Committee are Patman and Austin: Austin, Price Discrimination Under the Robinson-Patman Act, 39 (1959); Patman, Complete Guide to the Robinson-Patman Act, 23, 35 (1936). Rowe is of a contrary opinion. Rowe, Price Discrimination Under the Robinson-Patman Act, 76 (1962).

[6] 346 U.S. 61, 63, 74.

ent with the broad antitrust policy of Congress that they be given recognition under the "like grade and quality" test of the Act. In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.

The Commission relies primarily upon this Court's opinion in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F(2) 916 (5th Cir. 1962), a treble damage action in which we upheld the sufficiency of the charge in a complaint that the respondent discriminated in price by selling its nationally advertised liquors at one price while selling identical liquors under different labels to a favored customer at a lower price. That decision clearly does not control this case. The complaint which we upheld there affirmatively alleged that the products, although labeled differently were sold "upon the express representation that [the lower priced liquors] were in reality higher priced nationally advertised brands * * * packaged and labeled under different trade names". The label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. In the present case, by contrast, the private label customers were forbidden to make any use of the Borden name in selling the private label milk and, so far as the record disclosed, they never represented the private brands to be Borden products. In this case, the brand name had commercial significance. Whatever significance the brand names might have had in *Hartley & Parker,* absent the seller's representation that the differently labeled products were the same was nullified by that representation.

We do not find the administrative precedents urged upon us by the Commission applicable to this case.[7] Although it is true that these administrative decisions all treated goods of differing brands as being of like grade and quality, they are, however, clearly distinguishable from this case. In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it imparted a premium market value to the Borden product which the private label product did not enjoy. That the Borden brand product should sell for a higher price than the lesser known private brands came as no surprise to anyone.

The Commission precedent would be of some weight if we were here holding that the mere affixing of different labels to physically identical products is sufficient to make them different in grade, but we do not so hold. It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product. Different labels may be of no economic significance whatsoever. However, where it is demonstrated that a label enjoys a

[7] The Commission relies upon its line of decisions holding that goods which are the same in all respects except labels are of like grade and quality for the purposes of Section 2. *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *United States Rubber Co., et al.*, 28 F.T.C. 1489 (1939); *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), reversed on other grounds 101 F. (2) 620 (6th Cir. 1939).

significant consumer acceptance such that buyers are willing to pay more for the product which bears that brand, then it is clearly of commercial significance in the most direct and obvious way—namely, it causes the product to sell for a consistently higher price in a competitive market. That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike "grade". Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act. A manufacturer would be free to discriminate in price between purchasers merely by affixing comparable, but different, private labels to the goods sold to each of them. We do not countenance such a practice, but merely recognize the demonstrated commercial significance of the Borden brand here, as compared to the private label brands.[8] The record shows that identification with the Borden Company through its brand name has value in the evaporated milk market. That value has been clearly proven by Borden in this case and it should be allowed to take it into account in pricing its products.

The Commission precedents which are more analogous to this case are those involving the closely related "meeting competition" defense under Section 2(b).

[8] As pointed out by the Second Circuit in *Atlanta Trading Corp.* v. *F.T.C.*, 258 F. (2) 365 (2nd Cir. 1958), "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded". In setting the Commission's order aside the Court held that certain pork products were not of like grade and quality, pointing out, among other things, that the Commission had failed to take account of the prices at which the products sold.

There the Commission has given full recognition to the significance of the higher prices commanded by premium products in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it.[9] The most recent example is *Callaway Mills Co.*, 3 Trade Reg. Rep. Ph. 16800 (F.T.C. Feb. 10, 1964) where the Commission rejected the seller's meeting competition defense on the ground that it had failed to prove that its carpeting was "similar in grade and quality" to that of the competitor's whose prices it was meeting. The Commission stated that:

> "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods".

The Commission apparently assigned to the "grade" concept the public demand or salability characteristics

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[9] As the Commission stated in *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the produce at a higher price in a normal market".

Similarly in *Standard Oil Co.*, 49 F.T.C. 923 (1953) the Commission stated, "There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."

See also *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, rev'd on other grounds, 191 F. (2) 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).

of a product and to the "quality" concept its intrinsic or physical characteristics. This approach cuts both ways. If it is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case. The ambiguities of the Robinson-Patman Act are troublesome enough without further muddying the water through inconsistent administrative determinations dealing with important questions of law. Ultimately it is the Court which has the duty to decide such questions. As Justice Brandeis wrote, concurring in *St. Joseph Stock Yards* v. *United States,* 298 U.S. 38, 84 (1936), "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceedings in which facts were adjudicated was conducted regularly." See also *United States* v. *Morgan,* 307 U.S. 183, 191 (1939).

Since the Commission's erroneous determination that the products were of like grade and quality was an essential element of its cease and desist order, the petition to set aside the order is granted. We do not render any decision on the other questions presented in the case. The Petitioner's arguments concerning injury to competition and its cost justification defense seem to have considerable merit, but we do not pass on them here. The holding that the products were not of like grade and quality requires us to set aside the Commission's order and make it unnecessary for us to consider the other points raised.

Petition to set aside the cease and desist order is

GRANTED.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1964

No. 20463

THE BORDEN COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Trade Commission

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

JUDGMENT

This cause came to be heard on the petition of The Borden Company, for review of an Order of the Federal Trade Commission issued on January 30, 1963, in Docket No. 7129, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition to set aside the cease and desist order in this cause be and the same is hereby, granted.

December 4, 1964.

Issued as Mandate: December 30, 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1127

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

THE BORDEN COMPANY, *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted on behalf of the Respondent The Borden Company, in opposition to the petition of the Federal Trade Commission for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on December 4, 1964.

Question Presented

The Respondent manufactured and sold two evaporated milk products: (1) a premium product which consistently commanded a higher price at all levels of distribution, and (2) a chemically identical but com-

mercially less acceptable product which the Respondent (like all other producers and handlers thereof) had to sell at lower prices if the product was to be sold at all.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act prohibits price discrimination only in respect of "commodities of like grade and quality."

The question presented is whether on the record before it the Court of Appeals correctly held that the premium product was not of like grade and quality with the commercially different, non-premium product, and that therefore the Respondent's selling of the non-premium product for lower prices than those received for the premium product did not violate Section 2(a) of the Robinson-Patman Act.

Questions Not Presented

The case does not, as stated at page 2 of the petition, present any question whether a mere change in labels can change the grade and quality of a product. The Court of Appeals emphatically rejected any notion that any such "artificial distinction" could be of any legal significance (Pet. App. A, pp. 27-28)*; and the court put its decision squarely on the ground that in this case it has been thoroughly demonstrated that the difference was a very real one, in that the premium product in fact commanded a consistently higher price at all levels of distribution—wholesaler, retailer and consumer—than did the non-premium product.

* "Pet. App. A" means the petition's Appendix A, which is a copy of the Court of Appeals' opinion.

Nor does this case, as urged at pages 8-9 and 16 of the petition, present any question of favoritism to "large buyers" or "chain stores". Quite the contrary, what the record shows (see pages 6-7 below) is that independents as well as chains purchased the non-premium product; that chains as well as independents purchased the premium product; that many independents as well as many chains handled both products; and that the Respondent "made no distinction between large and small accounts." (R. 33).

In fact, this is merely another in a long line of Robinson-Patman cases in which it has uniformly been held that a premium product not only may, but must, be sold at the higher price normally commanded by it in the marketplace; and that the premium differential, established by and customarily existing in the market, is to be taken into account regardless of whether the premium and the non-premium products are physically the same. The Court of Appeals, here, applied precisely the same test for purposes of Section 2(a) of the Robinson-Patman Act as had previously been applied, by the Commission and by the courts, for purposes of Section 2(b) of the same statute.

Statement

Premium and non-premium products, under the Robinson-Patman Act. In the terminology customarily employed by the Commission under the Robinson-Patman Act, a sharp distinction is drawn between "premium" products on the one hand and "non-premium" products on the other. As most recently defined by the Commission, in *Callaway Mills*

Co., CCH Trade Reg. Rep. Transfer Binder 1963-1965 ¶16800 (FTC, Feb. 10, 1964, at p. 21,755), a premium product is one which "normally commands a price higher than that usually received by sellers of competitive goods." The premium product may command the higher price because of "intense public demand" and "saleability". Or it may command the higher price because of "intrinsic superior quality". In either event, whether the reason is its grade or its quality, the fact that the product normally commands a higher price makes it a premium product.

Premium and non-premium products, in the evaporated milk business. This sharp distinction between premium and non-premium products has prevailed for many years in the evaporated milk business. There have been three premium products: Carnation, Pet and the Respondent's Borden brand, which has been on the market for over 70 years. At all levels of distribution, these brands have sold at substantially higher prices than the non-premium brands, consisting in the main of evaporated milk put up by more than 25 different packers under the private labels of the purchasers (Pet. App. A, pp. 23-24, 27; R. 78, 879-84).

Throughout the market, the wholesalers and the retailers have paid more for the premium brands; and likewise they have resold the premium brands for more (and with less selling effort), than the private brands (Pet. App. A, pp. 23-24, 27; R. 431-34, 478-81).

As one of the Commission's wholesaler witnesses put it:

> "Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail

> trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have $1.50 or $2 a case spread to make it interesting." (Pet. App. A, p. 24; R. 330-332)

And as the Hearing Examiner pointed out in that connection, "Respondent was not offering its private-label milk for that much less than its Borden brand milk." (R. 54).

Reasons why Borden brand evaporated milk is a premium product. The reasons why the Respondent's Borden brand milk commanded that higher price are abundantly clear in the record. Consumers had confidence in the Borden brand name and in the Company behind it—a confidence grounded in factors such as long and favorable experience with the Borden product, unfavorable experiences with private labels, physicians' recommendations as to the best brand for infant feeding, and the Respondent's advertising and promotional efforts (Pet. App. A, p. 23; R. 24-25, 230, 246-47).

Consumers' favorable experience with the Borden brand product, in contrast to unfavorable experiences with private labels, was no accident. It was the result of the Respondent's continuing concern for the Borden brand product, from the day it was packed to the day it was put in the hands of the consumer, all to the end that no consumer should ever get any stale or otherwise deteriorated Borden brand milk. First packed, first shipped was the rule, even though that often involved costly shipping from far-away plants or storage warehouses;

and the Respondent had more than 200 representatives out in the field, going into the retail stores and checking the freshness of the shelf and storeroom stocks of the Borden brand product (R. 60-61, 493-94, 510-11, 544).

With respect to the private label, on the other hand, the Respondent simply packed the product as and when instructed by the customer and held it at the packing plant subject to the customer's delivery instructions; and the Respondent did nothing more, and it took no responsibility whatsoever, after the product left the factory door. The private label product was sold f.o.b. plant, with only the purchaser's label on it; the Respondent's name nowhere appeared on it; and any use of the Respondent's name in connection with that product was prohibited (R. 61-62, 519-22).

Independents as well as chains handled both the non-premium product and the premium product. The Respondent, manufacturing and selling both the premium (Borden) brand and the non-premium (private label) product "made no distinction between large and small accounts" and no purchaser was "for any reason, denied the right to buy private-label evaporated milk from the Respondent." (R. 33, 54).

The handlers of the private label included not only some chain retailers (R. 813-15) but also an even larger number of wholesale grocery concerns (R. 809-12) and cooperative buying associations of retailers (R. 815). And everyone who purchased at the same plant in any given month paid the same price, regardless of who he was, how big he was, or how much he bought (R. 79).

So, too, with the handlers of the Borden brand, which was sold on a uniform delivered price basis

throughout the country (R. 19) to all kinds of customers including retail chains (R. 820-22) as well as wholesalers (R. 815-18) and cooperative buying associations of retailers (R. 819-20).

Many purchasers, including chains as well as independents, bought both the Borden brand product and the private label product. With the private label freely available to them at the lower prices, the group of purchasers of private label from the Respondent nevertheless kept right on buying the Borden brand, at the higher prices, in substantially undiminished quantities (Pet. App. A, p. 24; R. 943). They did not substitute the lower priced private label product for the higher priced premium product. They regarded private label and Borden brand as two different products, each with its own price level and its own competitive situation.

The absence of competitive injury. As previously noted, the wholesalers and retailers had to pay more for Borden brand, but they could resell it for more. They bought private label for less, but they also had to resell it for less.

Turning to the producer or "primary" line of competition, the evidence showed some shifting of private label business to the Respondent at plants where it had the geographic and freight advantage, and some shifting of such business away from the Respondent in instances where competitors' plants were more advantageously located. The over-all result was that during the complaint period the testifying competitors, far from losing out, actually increased their market share,

sold larger amounts of private label than before, and sold it at higher prices (R. 31-57, 753-67).

The Hearing Examiner made a detailed analysis of the evidence, after a trial extending over almost three years, and ordered the complaint dismissed on the ground that there was no competitive injury (R. 57).

The absence of any basis for the contrary findings at the Commission level—findings made by only two of the five Commissioners, with one Commissioner dissenting and two not participating—was thoroughly briefed before the Court of Appeals, which found it unnecessary to decide the issue in view of its decision on the threshold issue of like grade and quality. The Court nevertheless observed, at the close of its opinion, that the Respondent's arguments as to the absence of competitive injury "seem to have considerable merit" (Pet. App. A, p. 30).

The cost-justification of the challenged price differences. The Hearing Examiner also ordered the complaint dismissed on the separate and independent ground that the Respondent (whose costs had been analyzed in meticulous detail by independent public accountants) had sustained its burden of proving that the challenged price differences were cost-justified (R. 74).

Here again, the absence of any warrant for the contrary conclusion at the Commission level was briefed in detail before the Court of Appeals. Again, as on the injury issue, a decision by the Court of Appeals proved unnecessary; but as to the cost justification issue, too,

the court commented that the Respondent's arguments "seem to have considerable merit" (Pet. App. A, p. 30).

Reasons for Denying the Writ

1. **The Court of Appeals' decision was clearly correct.** The opinion of the Court of Appeals, holding that the Respondent's premium product and its non-premium product were not of like grade and quality, evidences a most thoughtful attention to the considerations urged upon the court by the Commission as well as by the Respondent; and the court's detailed exposition of the reasons for its holding need not be repeated here.

What it comes down to, quite simply, is that the court recognized that trade and commerce, not chemistry, is the province of the Robinson-Patman Act, and that the prices at which people actually buy and sell goods are at the very heart of trade and commerce. Once those facts are recognized, it inexorably follows that a product which customarily commands a price of well over $6.00 per case is a quite different product from one which everybody has to sell for around $5.00 or less in order to sell it at all (Pet. App. A, pp. 23-24, R. 19-20, 26-30, 78). And as the Commission concedes, at page 9 of the petition, "Congress explicitly did not prohibit a seller from charging less for a different product."

The Commission, contending that commercially different products are nevertheless the same for purposes of this trade regulation statute, simply asserts that the "grade and quality" of commodities refers to their

physical properties and not to the prices that they command in the marketplace—and says that this is "a matter of simple English usage."

That was not the "simple English" of it to Judge Learned Hand. In a decision under another trade regulation statute, handed down at the very time when the Robinson-Patman amendment was pending before the Congress, Judge Hand emphasized the significance of consumer preferences grounded in considerations other than physical differences, as follows:

> "Commercially the [advertised] brands had come to mean a better grade of milk, for the hygienic properties of a product do not fix its commercial quality, but the opinion in which buyers hold it." *Borden's Farm Products Co.* v. *Ten Eyck,* 11 F. Supp. 599, 600 (S.D.N.Y. 1935), *aff'd,* 297 U.S. 251 (1936)

Moreover, as recently as 1964, the Commission's own view as to the "simple English" reading of "grade and quality" was radically different from its presently asserted position. In *Callaway Mills* (pages 3-4 above) the Commission categorically held that in order to establish "grade and quality" proof must be adduced not only as to "intrinsic quality" but also as to "saleability"—thus assigning to the term "grade" the public demand or saleability characteristics of a product, and to the term "quality" the intrinsic or physical characteristics of a product.

In short, the "simple English" of it is that the statute, in so many words, calls for likeness in two respects: "grade *and* quality"—likeness in the marketplace as well as likeness in physical composition. Since

the proof established beyond a shadow of a doubt that Borden brand and private label were radically unlike in the marketplace, the first of the two statutory criteria was not met and the two products were not of like grade and quality within the meaning of the statute.

Equally without merit are the Commission's references to legislative history. The Patman remarks quoted at pages 9-10 of the petition were obviously of an off-hand nature ("I have not time to discuss that feature"); they referred only to "same quality"; and they made no reference to "grade". The more formal and definitive statement on the subject, made by the man whose authorship of the Patman bill was expressly confirmed by Congressman Patman, is the one set out at pages 10-11 of the petition. That statement expressly sanctioned the very kind of premium brand-private label operation which is involved in this present case. The Respondent sold its standard Borden brand evaporated milk at the prices commanded by that product, just as the legislators in the quoted statement contemplated a manufacturer would continue to do. The Respondent also packed evaporated milk under the private labels of the purchasers, just as the legislators there said it would be free to do. And the equality of treatment among private label purchasers, which the legislators wished to assure, was established in exactly the way the legislators said it should be; viz., the Respondent stood ready to pack that product for all, on the same terms (Pet. App. A, p. 21; R. 33, 54).

Likewise without basis is the Commission's claim that the Court of Appeals' decision is a departure from the Commission's "well-settled administrative inter-

pretation." The simple fact, as the Court of Appeals pointed out, is that in none of the Commission's previous cases had there been "any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not." (Pet. App. A, p. 27). In the earlier cases, a premium product was a mere theoretical possibility, involving (as the Commission puts it at page 12 of the petition) goods which "might" be sold at different prices. Here, in total contrast, the premium character of the Borden brand and the non-premium character of the private label is no mere theoretical possibility; it is a thoroughly proved actuality.

2. **The Court of Appeals used precisely the same product comparison test as has uniformly been used by the Commission and by the courts under the Robinson-Patman Act.** There is nothing at all new about taking into account, for product comparison purposes under the Robinson-Patman Act, the prices at which the products customarily sell in the marketplace as well as the physical characteristics thereof. Both the Commission and the courts have been doing that, time and again, for many years. The court below cited a number of examples, including the Commission's own most recent *Callaway Mills* decision, handed down in 1964 (Pet. App. A, p. 29).

In that case the Commission categorically held that in order to prove "grade and quality" attention must be given not only to the "intrinsic superior quality" of one product over another, but also to the "intense public demand" that may exist for one product as com-

pared with another (CCH Trade Reg. Rep. Transfer Binder 1963-1965, at p. 21,755).

And as the Commission had stated some years earlier in *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 302 (1957):

> "The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market."

Similarly in *Standard Oil Co.*, 49 F.T.C. 923, 952 (1953) the Commission stated that:

> ". . . in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."

The foregoing rulings were made for purposes of Section 2(b) of the Robinson-Patman Act. In the present case the issue arises under Section 2(a) of that same trade regulation statute. The Court of Appeals in the present case applied precisely the same product comparison test as had been applied in all of the earlier Robinson-Patman cases.

This, on the face of it, would hardly seem to give rise to any problem calling for consideration by this Court.*

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* The Commission, in the absence of any legal authority for its position, quotes (p. 16) an advertising magazine's characterization of the decision below. For a professional discussion of the matter see Consumer Brand Preferences and "Like Grade and Quality" under Robinson-Patman Act, 65 Col. L. Rev. 720 (1965), which concludes at page 725 with the statement that ". . . once such a consumer preference has been demonstrated, the Commission and the courts should acknowledge that physical comparison is not the only basis for selection in the market place, and conclude that the similar products sold under premium and private labels are not of like grade and quality."

3. **The Court of Appeals' decision is in full accord with the decisions of this Court and of all the Courts of Appeal; there is no conflict.** The Commission asserts no conflict, and there is none.

Indeed, the principal judicial authority relied upon by the Commission, before the Fifth Circuit, was a decision of that same Court of Appeals; and the inapplicability of the earlier case, *Hartley & Parker, Inc.* v. *Florida Beverage Corp.,* 307 F. 2d 916 (5th Cir. 1962) was specifically pointed out in the court's opinion in the present case (Pet. App. A, p. 26).* In *Hartley & Parker,* in total contrast to the present case, the two products were not only physically alike but were being marketed and represented as the same product. Thus the two *Hartley & Parker* products were in fact like goods, commercially as well as physically. The *Hartley & Parker* situation was the same as in the old *Goodyear* case, where the private label handler, Sears, was in fact trading on the Goodyear brand name and thus rendering the two products alike, commercially as well as physically.**

The Fifth Circuit's decision in the present case, far from being in conflict with any other court, is affirmatively in accord with the highly relevant decisions of the Second Circuit in *Atalanta Trading Corp.* v. *FTC,* 258 F. 2d 365 (2d Cir. 1958), and of this Court in *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953).

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* Judge Rives, who wrote the opinion in *Hartley & Parker,* was also a member of the panel which heard the present case, and he joined in the unanimous decision below.

** *Goodyear Tire & Rubber Co.,* 22 F.T.C. 232, 295, 297 (1936); Brief of Counsel Supporting the Complaint in Opposition to Respondent's Motion to Dismiss, pp. 2-6; Order dated June 26, 1934.

In *Atalanta* (as the Fifth Circuit noted in the present case, Pet. App. A, p. 28, n. 8) one of the reasons for the Second Circuit's rejection of the Commission's ruling on like grade and quality was that the Commission had erroneously failed to take into account the prices at which the products were sold—precisely the error that the Commission made in the present case.

In *Automatic Canteen,* this Court emphasized at pages 63 and 74 that the Robinson-Patman Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so as to avoid a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." The court below, after quoting those statements, went on to note that "Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity, in conflict with the realities of the marketplace and Congressional antitrust policies." (Pet. App. A, p. 25).

The Commission stands silent with respect to *Atalanta* and *Automatic Canteen,* and fails even to mention either of those highly significant cases.

4. **The petition seeks to raise hypothetical questions, not presented by or ripe for decision on this record.** The Commission, unable to raise any substantial question about the soundness of what was actually decided by the court below, has in the main directed its petition to the purely hypothetical questions noted at pages 2-3 above.

The time, if ever, when a lower court holds that a mere change in labels can change the grade and quality of a product will be the appropriate occasion, we respectfully submit, for this Court to address itself to that proposition. In the present case, as noted at page 2 above, the proposition has already been categorically rejected by the Court of Appeals.

So, too, with the alleged problems of favoritism to large buyers and chain stores. As shown at pages 6-7 above, no such problems are presented on this record. Purchasers of all classes, small and large, independent and chain, bought both products, and all were treated alike. The time, if ever, when another *Goodyear* situation arises, with a single large purchaser of private label buying at a lower price but in fact trading on and getting the benefit of the brand name, will be the appropriate occasion for this Court to consider alleged "large purchaser" and "chain store" problems. On the present record, consideration of such matters would be entirely hypothetical.

Conclusion

The decision below is clearly correct; it is in full accord with previous decisions of the Commission, of the lower courts and of this Court; and the issues sought to be presented by the petition are hypothetical.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE BORDEN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 975–985) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98–123) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (R. 986). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965 (R. 987). The petition was filed on the latter date and was granted on October 11, 1965 (R. 988). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain discriminations in price involving "commodities of like grade and quality." The question presented is whether products identical in all other respects cease to be of "like grade and quality" when they are sold at a higher price under the manufacturer's nationally advertised brand than under retailers' private brands.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging that since January 1, 1956, the Borden Company ("Borden") had discriminated in price in selling evaporated milk, in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private labels at lower prices than it sold its "Borden" brand milk, and that the effect of such price discrimination may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1–5).

Borden is one of three companies which sell evaporated milk under a nationally advertised brand name (R. 99).[1] Evaporated milk also is produced and distributed under private brands by chain stores and by small processors for sale under the brands of their customers (R. 99–100). All of these producers competed with Borden in the sale of evaporated milk (R. 100).

Respondent sells its Borden brand at the same delivered price throughout the United States; it sells this brand primarily to wholesalers or jobbers, and to chain stores (R. 78). In addition, since 1938 it has distributed evaporated milk under the private brands of its purchasers. It sold such milk at prices which were net f.o.b. at its processing plant, and such prices

[1] The two others are the Pet Milk Company and the Carnation Company (R. 99).

varied from plant to plant and from month to month (R. 79). During the period covered by the complaint, "the f.o.b. price of respondent's private label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk" (R. 80). The "physical composition" and "quality" of the private brand evaporated milk were the same as those of the Borden brand (R. 79–80).

There is no evidence in the record that Borden refused to sell private brand evaporated milk to any purchaser who specifically requested it.[2] But Borden never offered the private brand milk to its customers generally. Indeed, its merchandising manager in May, 1957, explained that Borden's policy was that "Our Brokers *should not* bring up the subject [of private label evaporated milk] themselves. * * * We do *not* wish Brokers to solicit such business" (emphasis in original; R. 743). A few months later, he stated that "We certainly don't want to end up by soliciting a bunch of 'peanut' accounts." (R. 827).

Wholesalers and retailers testified that they would have purchased the Borden private brand evaporated milk, but that it was not made available to them. (R. 207, 222, 223, 279, 280, 297, 304, 320, 321, 329, 340, 341, 352–353, 364, 372, 373, 387. See, also, R. 241). Two of the wholesalers were told by their brokers that the latter knew nothing about the availability of the private brand (R. 321, 329, 392).

[2] Although the examiner found that there was "no evidence that any purchaser was, for any reason, denied the right to buy private-label evaporated milk from the Respondent" (R. 54), the Commission vacated his decision (R. 128).

Many of these wholesalers and retailers viewed the private brand as an aid in competing with the large chains (R. 207, 241–242, 280, 304, 321, 322, 365). Thus, an official of a wholesale grocery company which was owned by retailers explained that "it would have enabled us, possibly, to have had a label or a milk that we could have met chain store competition with on their private labels" (R. 280).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98–128).[3] Following its prior decisions that "goods which are the same in all respects except label are * * * goods of like grade and quality" (R. 101–102), the Commission ruled that since, as respondent conceded, the Borden brand and the private brands of evaporated milk were "physically * * * alike" (R. 100–101),[4] they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials

[3] Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

[4] The Commission found (R. 79–80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

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constituted "discrimination" (R. 105–106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106–120), and that they were not cost justified (R. 126).[5]

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107–108); that because of the competitive situation of respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by

[5] The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21–22, 31). He further held, however, that the discriminations did not result in competitive injury at either level of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76–97).

the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on the testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially lower-priced private label milk if it had been made available to them (*supra*, p. 4); and that, because of "the extremely low or nonexistent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116–120; see R. 741–743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (R. 978). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (R. 977, 979). It ruled (R. 981) that "[i]n determining whether products

are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name." (R. 983). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (R. 985).

INTRODUCTION AND SUMMARY

The court of appeals noted (R. 978) that the Borden brand and the private brand cans of evaporated milk "are packed exactly the same" except for the difference in labels, and that it was "undisputed" that "the chemical content of the products is identical." The court further conceded (R. 982) that "the mere affixing of different labels to physically identical products is [not] sufficient to make them different in grade * * *." It held (*ibid.*), however, that "when those labels are proven to have demonstrable commercial significance * * * [then] they can change the grade of a product." In other words, under the court of appeals' theory the grade and quality of goods depend upon not only their physical characteristics, but also upon the extent of consumer acceptance of the brand name under which they are sold; and physically identical goods cease to be of the same "grade and quality" if the advertised "label enjoys a significant consumer acceptance such that buyers are

willing to pay more for the product which bears that brand" (R. 982).

The effect of this ruling is to remove from the coverage of Section 2(a) of the Robinson-Patman Act virtually all discriminations in price between physically identical commodities that are sold under both a well-advertised brand name and a private label. For it is common knowledge that private brands today are used principally by large retail distributors as a means for selling widely-used products at prices below those of the well-known, extensively advertised brands. The effect of the court of appeals' interpretation of the "like grade and quality" clause is that, no matter how substantial the price differential between the manufacturer's brand and the private brand may be, and no matter how serious a competitive injury the discrimination may cause, the Commission is denied any authority to deal with such anticompetitive practices under Section 2(a). On the other hand, the Commission's settled view that the "grade and quality" of a commodity depend solely upon its physical characteristics and not upon the extent to which the public has been persuaded to pay more for a particular brand, permits the Commission fully to examine and evaluate the effect of the discrimination upon competition under the statutory criteria governing that issue. Thus, the court of appeals' conclusion (R. 983) that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden company through its brand

name" does not justify its interpretation of "like grade and quality." The "value in the evaporated milk market" of the Borden brand name can be given whatever weight it is entitled to in determining the competitive effect of Borden's price discriminations—an issue upon which the court of appeals has not yet passed and which therefore is not now before this Court. *Cf. Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

An interpretation of Section 2(a) that has such unfortunate consequences should not be made unless clearly compelled by the language itself, the legislative history, or the overall statutory design. We shall show, however, that all three of these factors compel the contrary conclusion, *i.e.*, they show that Congress intended the "grade and quality" of a commodity to relate only to its physical characteristics and not to consumer preferences based upon brand names that are reflected in the higher prices that particular brands can command in the marketplace. More particularly, we shall show that Congress specifically considered and rejected the suggestion that differences in the brand names under which the same commodity is sold would make them of different "grade and quality"; that treating such differences in consumer preferences as differences in "grade and quality" would prevent the Commission from dealing under Section 2(a) with one of the major evils at which that section was directed; and that the court of appeals' construction of the statute is contrary to the Commission's settled interpretation.

ARGUMENT

TWO PRODUCTS WHICH ARE OTHERWISE IDENTICAL ARE OF "LIKE GRADE AND QUALITY" WHETHER SOLD UNDER A PRIVATE BRAND LABEL OR AT A HIGHER PRICE UNDER THE MANUFACTURER'S OWN BRAND

A. CONGRESS INTENDED THE "GRADE AND QUALITY" OF COMMODITIES TO REFER TO THEIR PHYSICAL CHARACTERISTICS, NOT TO CONSUMER PREFERENCES ATTRIBUTABLE TO BRAND LABELS

1. *The language of the statute.* Section 2(a) prohibits certain discriminations in price between purchasers of commodities of like grade and quality. In common parlance, two commodities are of "like grade and quality" when they are the same. "Grade and quality" involve a commodity's inherent characteristics, not the price at which it is sold. The fact that a particular brand name is so well accepted by consumers that some are willing to pay more for the identical product when sold under that name than when sold under a less well known label does not change the "grade and quality" of the product. "[G]rade and quality" remain the same no matter what brand name the commodity is sold under or how much more some consumers are willing to pay for it. The change is in consumer "acceptance" of, or "preference" for, the particular brand, which change is reflected in consumer willingness to pay a higher price therefor.

In the present case the raw milk, the canning processes, the cans and the final product (the evaporated milk) are concededly identical; the only difference is the label which respondent affixes to the cans. Because respondent has extensively advertised its Borden brand, many consumers are willing to pay more

for an identical can of evaporated milk that bears the Borden label than they are willing to pay for the same can when it has a private label. But if such consumers knew that they were buying the identical product under the Borden label, they would hardly conclude that they were obtaining a product of superior "grade and quality" merely because the extensive advertising of that brand enables respondent to sell it at a higher price.

"[D]iscrimination in price," as used in Section 2(a), means "selling the *same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 721) (emphasis added). The limitation of the statutory prohibition to discriminations involving commodities of "like grade and quality" serves important functions. On the one hand, it makes it clear that a seller may charge different prices for products having significant variations in grade and quality—such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act. On the other hand, the limitation prevents "emasculation of the section by a supplier's making artificial distinctions in his product"[6] which do not really change its grade and quality. It also reflects the fact that any attempt to measure the economic significance of price discriminations between different grades and qualities of the same product would entail an almost impossible in-

[6] *Atalanta Trading Corporation* v. *Federal Trade Commission*, 258 F. 2d 365, 371 (C.A. 2).

quiry. If, for example, the Borden brand of evaporated milk had a 75 percent higher fat content than the private brand and contained additional vitamins, it would be almost impossible to determine whether the higher price of the Borden brand merely reflected those facts. By restricting Section 2(a) to discriminations involving commodities of like grade and quality, Congress wisely provided a simple test for determining the threshold applicability of the Act.

2. *The legislative history.* The legislative history confirms that Congress used the words "like grade and quality" in their normal sense of referring to the physical characteristics of goods, and not to their selling price. The history shows that Congress was aware that chain stores had used private brands to gain an unfair competitive advantage over their smaller competitors; and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under a name brand or under a private brand.

Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were of "like grade and quality" (80 Cong. Rec. 8115, emphasis added):

> Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?
>
> Mr. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the

> independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package,* and this will remedy the situation to which the gentleman refers.
>
> Mr. TAYLOR of South Carolina. *Irrespective of the brand.*
>
> Mr. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, Counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra,* 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.,* 2d Sess., at 469):

> To amend the bill by inserting "and brands," after the words "commodities of like grade and quality," as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent

could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report quoted from the Commission's decision in *The Goodyear Tire & Rubber Co.,* 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears, Roebuck & Co. under the latter's private brand the same tires which it sold at higher prices under its own brand name. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4. The *Goodyear* case also was referred to frequently during the hearings (House Hearings, *supra,* pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to the Robinson-Patman Act, the earlier statute had a similar provision relating to "grade" and "quality."[7]

[7] In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differ-

Thus, the Committee was aware of the Commission's view that differences in brand did not change the grade or quality of a commodity; and, in the light of the other legislative history already discussed, the Congressional intention to make "grade and quality" turn solely upon physical characteristics is plain.

In short, as Professor Corwin Edwards, one of the leading commentators on the Act, has stated, "it is evident that the wording was carefully chosen to prevent price concessions to large distributors who sold commodities under their own private brands." Edwards, *The Price Discrimination Law,* 31 (1959).

B. THE COURTS OF APPEALS' INTERPRETATION OF SECTION 2(a) WOULD REMOVE FROM THE PROHIBITIONS OF THAT SECTION ONE OF THE MAJOR EVILS AT WHICH IT WAS DIRECTED

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission* v. *Henry Broch & Co.,* 363 U.S. 166, 168, emphasis added). The granting to large buyers of discriminatorily lower prices for private brand merchandise can be just such a device.

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ences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

The fact that the original Clayton Act used the terms "grade and quality" in the disjunctive, and the Robinson-Patman Act uses them in the conjunctive, is of no significance. There is nothing to show that Congress intended thereby any change in the substantive standards. On the contrary, as developed in the text above, the legislative history demonstrates that Congress did not intend a change in brand name to constitute a change in the "grade and quality" of a commodity.

Thus, the effect of the court of appeals' decision is to bar the Commission at the threshold from dealing with one of the major evils at which the statute was directed.[8]

1. Price discriminations can take many forms. They are just as anticompetitive if accomplished by giving a lower price on the same commodity when sold under a private brand than when sold under a name brand, as when done through a price differential on the same brand. In either situation the purchaser who does not have the benefit of the discriminatorily lower price is under an obvious competitive disadvantage as against the purchaser who does. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46–47.

A retailer who can offer his customers the lower-priced private brand has a significant advantage over his competitors who cannot do so. For there are today a tremendous number of customers who prefer the cheaper private brands over the more expensive well-known ones. It has been estimated that in the past ten years the volume of business accounted for by private brands has doubled (*The Battle of the Brands,* Dun's Review and Modern Industry, May 1964, p. 53); six years ago it was reported that such brands accounted for more than 25 percent of the food sales in supermarkets (*Food Topics,* October 1959, pp.

[8] We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

6–7). See, also, *Battle of the Brands,* Price-Conscious Buyers Help Private Labels Expand Market Share, Wall Street Journal, May 24, 1965, p. 1. Some of these customers are willing to accept what they consider to be an inferior product just because it is cheaper. But a growing number of consumers has come to realize that in many cases the lower-priced private brand merchandise is just as good as the higher-priced name brand goods. See Wall Street Journal article, *supra.* Large organizations of consumers, as well as cooperative groups, devote themselves to the identification of such private brand bargains. See *How To Save $200 a Year at a Supermarket,* Consumer Reports, February 1961, pp. 64–67.

A retailer who cannot satisfy the large public demand for these lower-priced private brand goods obviously cannot compete effectively with a retailer who can offer them. Where the private label merchandise is in fact made available only to large purchasers, the inevitable result is to injure their smaller competitors. Indeed, the ability of the large retailers to offer the lower-priced private label brands causes competitive injury not only in the market for the particular product but also in the broader sense that the favored retailers can create or enhance a general reputation for selling generally at lower prices than the smaller stores. See R. 93. In this case many wholesale and retail grocers testified that they would have purchased respondent's private brand evaporated milk had it been made available to them, to enable them to compete more effectively with the large retailers who had such private brand. See the Statement, *supra,* pp. 4–5.

Thus, respondent's price discriminations involved the very kind of anticompetitive situation that the statute sought to reach. "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43.

2. A seller may also use an unadvertised brand in order to engage in price discrimination designed to injure his competitors (primary line injury). Clearly it would be illegal under Section 2(a) for a seller of a single brand of milk to discriminate in price, selling some of his milk below cost, if he is using the profits from his high price sales to finance a deliberate predatory campaign to drive competitors out of business. See, *e.g.*, *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115. Under the court of appeals' theory, however, Section 2(a) would not apply if the seller simply gave the low priced milk a different, unadvertised label, calling it Brand X instead of Brand A. The Commission's particular conclusions on primary line injury in this case are not now before the Court; whether its findings support its conclusions and whether those findings are supported by substantial evidence are

matters that should be decided by the court of appeals in the first instance. We simply point out here that under the court of appeals decision the Commission would be precluded from *ever* applying Section 2(a) to any case of price discrimination, no matter how extreme, where the seller sold the low priced goods under an unadvertised label; the Section would not apply to such cases whether they involved discrimination between customers in the same geographical area or in different geographical markets. *Cf. Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543–546.[8a]

3. Acceptance of the Commission's position that physically identical products that are sold for a higher price under a name brand than under a private brand are of like grade and quality, would not outlaw the practice of selling private brands for less than well advertised name brands. As we have pointed out, the only effect of our interpretation of Section 2(a) is to give the Commission authority to consider, under the pertinent statutory criteria, the effect of such discrimination upon competition. Before a discrimination in price between private and name brands of the identical product would violate the Act, the Commission would have to establish that its effect may be substantially to lessen competition. The respondent could then justify the discrimination if it could show that the lower prices were cost justified, or were made in good faith to meet the equally low price of a com-

[8a] Some aspects of the problem of injury to primary line competition resulting from discriminations in price between name and private brands are presented in *Utah Pie Company* v. *Continental Baking Company, et al.*, No. 489, this Term, certiorari granted, November 15, 1965.

petitor. Where, as in the present case, the injury at the secondary line resulted from the seller's refusal to make the private brand actually available to all of its customers, the seller could cure the violation by making it so available, and it would not be required to sell the name brand at the same price as the private brand.[9]

The Commission recognizes that the wide-spread acceptance of private brands has been due to the fact that ordinarily they are sold for less than name brands. See *supra*, pp. 17–18. It certainly has no intention of prohibiting this wide-spread practice of American merchandising that has enabled millions of consumers to enjoy the benefits of lower prices. But it does strongly believe that the Act authorizes it to prevent *all* price discriminations that have the proscribed anticompetitive effect, whether accomplished through the use of private brands or otherwise; and that treating physically identical goods as of different "grade and quality" merely because a name brand thereof has gained sufficient "commercial acceptance"

[9] The Commission's order (R. 952–953), which is designed to eliminate the effects of the discrimination upon both the primary and the secondary lines of commerce (R. 127), broadly prohibits respondent from "discriminating in the price of [food] products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher prices or with a customer of the purchaser paying the higher prices." Insofar as secondary line injury is concerned, however, the Commission interprets the order, as it explained in the court of appeals (see the Commission's brief in the court of appeals, copies of which have been filed with the Clerk, pp. 41, 43), as requiring Borden only to offer the private brand evaporated milk to all customers who want it, on terms that would make it actually available to them.

that customers are willing to pay more for it,[10] would seriously weaken the effectiveness of Section 2(a) in preventing the very kind of anticompetitive price discriminations at which it was aimed.

C. THE DECISION BELOW IS CONTRARY TO THE COMMISSION'S WELL-SETTLED INTERPRETATION

The holding below that physically identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administra-

[10] The court of appeals formulated the test for determining whether a name brand is of different "grade and quality" than a private brand of the identical product as whether the former has "commercially significant distinctions which affect market value" (R. 981). If, as seems likely, the court of appeals meant by this only that a substantial number of customers "are willing to pay more for the product which bears that brand" (R. 982), than the standard is an unrealistic one in terms of the very factor it purports to deem controlling. For the alleged "commercial significance" may itself result solely from the discrimination, *i.e.*, it may reflect only the fact that customers who shop in stores which cannot get the private brand necessarily are required to purchase the name brand. (In the present case, however, some firms that handled the private brand also apparently made substantial sales of the higher-priced Borden brand.) If, on the other hand, the court meant to suggest that in every case the Commission must make an economic analysis of the commercial significance of the particular name brand in the market, the Commission would be required to conduct a vastly complicated and useless inquiry. Among the difficult and often imponderable issues which such an inquiry would entail—in addition to the question, noted above, of what portion of the name brand sales are made by outlets which cannot get the private brand—are the extent of the demand for the name brand at the higher price, and the effect of substantial consumer belief that the name has no, or little, importance to them.

tive interpretation. For many years the Commission has consistently held physically identical goods to be "of like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973–975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see also, *The Goodyear Tire & Rubber Co.*, *supra*. "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391; see *United States* v. *Americans Trucking Ass'ns.*, 310 U.S. 534, 549).[11]

The court of appeals, although recognizing that these Commission decisions "all treated goods of dif-

[11] The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463–464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424–428 (1963). Contra: Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

fering brands as being of like grade and quality," distinguished them on the ground that "[i]n none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not" [12] (R. 982).

Apart from the fact that consumers ordinarily will not buy a private brand unless it sells for less than a name brand (see *supra*, pp. 17–18),[13] these cases show that the Commission consistently has not deemed differences in brand names as significant in determining the "grade and quality" of a commodity under section 2(a). In holding in the present case that such differences may change "grade and quality," the court of appeals has departed from the Commission's settled interpretation of the statute, and this is so even though the Commission decisions did not focus on the "commercial acceptance" of the brand name.

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[12] This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that national brands of vodka and whiskey were of "like grade and quality" with the same liquors sold under private labels. The court stated (R. 981) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * *"

[13] Three of the Commission cases which the court of appeals cited (*United States Rubber Co.*, 28 F.T.C. 1489; *The Good-*

D. THE COMMISSION'S TREATMENT OF "GRADE AND QUALITY" UNDER SECTION 2(a) IS NOT INCONSISTENT WITH ITS TREATMENT OF THAT ISSUE IN EVALUATING THE "MEETING COMPETITION" DEFENSE UNDER SECTION 2(b)

The court of appeals also concluded (R. 983–984) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides.[14] The latter section permits a seller to rebut a prima facie case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price

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year Tire & Rubber Co., 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6); *United States Rubber Co.*, 46 F.T.C. 998) involved price discriminations between well-advertised name brands—U.S. Royal Tires, Goodyear Tires, and U.S. Keds (canvas shoes)—and the identical products sold under private labels. As to those discriminations, it obviously could have been shown that consumers were willing to pay more for the name brands than for the private brands, had that factor been deemed relevant.

[14] Section 2(b) of the Robinson-Patman Act provides as follows:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is thereby not "meeting" but rather is "beating" his competitor's price. See, *e.g.*, *Anheuser-Busch, Inc.*, 54 F.T.C. 277; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co., Inc., et al.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 16,800.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. See *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 242. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand. But to recognize that the existence of a consumer preference for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section

2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."[18]

[18] Respondent erroneously asserts (Br. in Opp., 12–13; see *id.*, 10) that in the *Callaway Mills* case (cited in the text above) the Commission "categorically held that in order to prove 'grade and quality' attention must be given not only to the 'intrinsic superior quality' of one product over another, but also to the 'intense public demand' that may exist for one product as compared with another." The question in that case was whether Callaway had established that its volume discounts were given in good faith to meet the equally low price of a competitor. The Commission rejected Callaway's "meeting competition" defense. It pointed out that the proponent of such a defense must "identify with particularity both his goods and the competing goods whose price was met," and that Callaway "should have introduced proof as to the comparative quality and saleability of [its] goods and the competitive goods allegedly defended against." CCH Trade Reg. Rep. Transfer Binder (1963–1965) p. 21,755. In other words, in order to evaluate the defense, the Commission had to know whether Callaway was meeting the price of a product of substantially equal public acceptance, and it rejected the defense because Callaway had failed to present such proof. Although the examiner had found that "carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level," the Commission rejected that finding because "[t]here is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels." (*ibid.*)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court to decide the other issues in the case.

Respectfully submitted.

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NOVEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE BORDEN COMPANY, *Respondent*

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

THE BORDEN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE BORDEN COMPANY

Question Presented

The respondent manufactured and sold two evaporated milk products: (1) a premium product which consistently commanded a higher price at all levels of distribution, and (2) a chemically identical but commercially less acceptable product which the respondent (like all other producers and handlers of that product) had to sell at lower prices if the product was to be sold at all.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act applies only to price discrimina-

tion in respect of "commodities of like grade and quality."

The question presented is whether on the record before it the court of appeals correctly held that the premium product and the non-premium product were not of like grade and quality within the meaning of the statute.

Statement

The premium brand market and the private label market. In the market place, Borden brand and private label evaporated milk were sharply different products. Borden brand, on the market for over 70 years, was one of the three premium brands, universally recognized as such throughout the industry. Private label, too, had long been established as a separate entity in the market. Many wholesalers and retailers had their own private labels and the product was packed for them by any one or more of some 25 producing firms (R. 978-79, 19, 145-46, 156-57, 880-84).

All packers of private label sold that product at prices substantially below the premium brand price, for the simple reason that they had to, in order to sell the product at all. All wholesalers and retailers, large and small, expected to get private label for less than the premium brand price, and they knew that they would in turn have to resell private label for less. Private label was not "the same thing" for less money. It was a different product; and the purchasers of private label from the respondent, at the lower prices, continued to buy Borden brand, at the higher prices, in

undiminished quantities (R. 431-34, 478-81, 943). As one of the Commission's wholesaler witnesses put it, at the trial of this case:

> "Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk]. . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have $1.50 or $2 a case spread to make it interesting." (R. 330-32; quoted by the court of appeals at R. 979)

The amount of the spread, referred to by this witness, was somewhat greater (as the hearing examiner found, R. 54) than any difference between the respondent's prices for Borden brand and its prices for private label.*

The reasons why Borden brand evaporated milk was a premium product. The clear differentiation between the two products, made by wholesalers and retailers, was simply a consequence of the fact that consumers demanded Borden brand and were willing to pay a substantially higher price for it than for the private label product. The reasons for this preference are clear in the record. The consumer confidence in the Borden brand name and in the company behind it was grounded in factors such as long and favorable experience with the Borden product, unfavorable experi-

* The maximum difference claimed by counsel supporting the complaint was $1.4519 per case (the amount shown at R. 807, line 2, after making the admittedly appropriate deductions, R. 412-16, of $.1320 for cash discounts and $.0800 for labels).

ences with private labels, and physicians' recommendations as to the best brand for infant feeding, as well as the respondent's advertising and promotional efforts (R. 978-79, 24-25, 230, 246-47).

Basic to the strong consumer demand for the Borden brand product was the fact that for many years the respondent had taken special pains to make sure that its premium product reached the ultimate consumer in perfect condition. When the respondent in its packing plants put the same milk in the Borden brand and in the private label cans, they were still a long way from the consumer; and evaporated milk is perishable. It must be kept under controlled conditions, and it must not be allowed to remain too long either in storage or on grocers' shelves. Otherwise, it may develop a stale or "canned" taste or become discolored, stringy, curdled or sour. Consumers, unable to test the quality of the contents before making the purchase and opening the can, necessarily place considerable reliance on the brand names and the companies behind them (R. 24-25, 675-76).

To assure the continued high quality of its Borden brand product as it came into the hands of the consumer, the respondent rigorously policed the flow of that product throughout the channels of distribution. Great care was exercised to see that it was stored under optimum conditions and that it was moved toward the consumer with the minimum of delay. First packed, first shipped was the rule, even though that often involved costly shipping from far-away plants or storage warehouses. In addition, the respondent had more than 200 representatives out in the field, going into the

retail stores and making code dating and sampling checks of the freshness of the shelf and storeroom stocks of the Borden brand product (R. 60-61, 493-94, 510-11, 544, 674-76).

With respect to private label, on the other hand, this responsibility lay with the wholesaler and retailer handlers. The respondent simply packed the product as and when instructed by the customer and held it at the packing plant subject to the customer's delivery instructions. The respondent did nothing more, and it took no responsibility for the product after it left the factory door (R. 20-21, 61-62).

The private label product was sold f.o.b. plant, with only the purchaser's label on it. The respondent's name nowhere appeared on it, and any use of the respondent's name in connection with that product was prohibited, both by the respondent and by its private label customers. The respondent wanted it that way because it could not guarantee the ultimate quality of the product and did not wish to risk any tarnishing of its valuable name by reason of anything that might happen to the product in the channels of distribution. The private label customers wanted it that way in order to be in a position to build up their own consumer goodwill and also because they wanted to be free to shift suppliers at any time. The consumers obtained the information important to them: *viz.*, where to place the responsibility in the event that any of the product failed to reach them in good condition (R. 61-62, 485-86, 519-22).

The wholesaler and retailer purchasers of Borden brand and of private label. There were over a hundred wholesalers among the private label customers, as well as a smaller number of chain store warehouses and

retailer-owned buying groups. One of these groups, whose purchases accounted for more than 10% of the respondent's private label volume, had over 1,000 retailer members.* The wholesaler purchasers of private label in turn offered that product to their retailer customers, just as they did the Borden brand which they purchased from the respondent. The evidence, adduced with respect to a particular one of these numerous wholesaler purchasers, shows that it affirmatively offered the private label to each of its 600 retailer customers, some of whom purchased the product and most of whom did not (R. 424, 431-34, 809-15).

As the Commission notes in its brief (page 4), there is no evidence that the respondent refused to sell private label to any purchaser who requested it.**

The proceedings in the Commission. The respondent commenced packing the private label product in a number of its plants in about 1938. The private label was sold on an f.o.b. plant basis, with prices determined under a cost-plus formula. The Borden brand, like the other two premium brands (Carnation and Pet), was sold on a delivered price basis which was uniform throughout the country (R. 19-21, 522-23, 527-28).

The handling of the two different products gave rise to no problem until in 1956 and 1957 the respondent expanded its private label operations to include its two southern plants, located at Lewisburg, Tennessee and

* Central Retailer-Owned Grocers, whose private label purchases are shown at R. 941; see *National Retailer-Owned Grocers, Inc.*, FTC Dkt. 7121, Initial Decision, p. 5 (October 13, 1961), as to the number of members.

** In instances where the respondent did not have the necessary production available when a request was received, such prospective customers were informed when supplies later became available (R. 541-42).

Chester, South Carolina. The respondent's costs at those plants were lower than at its midwestern and other plants, and under its private label pricing formula its customers in the southern area received the benefit of that saving as well as the substantial savings in freight. The result was that some private label business, previously served by other packers from faraway plants in the midwest, shifted to the respondent (R. 32-47). This litigation ensued.

The issues framed by the Commission's complaint (dated April 22, 1958) and the respondent's answer were whether Borden brand and private label were "of like grade and quality", whether the challenged differences in the respondent's prices for the two products were competitively injurious, and whether in any event such price differences were cost-justified.

After a trial extending over a period of almost three years, the hearing examiner ordered the complaint dismissed on the grounds that (a) there was neither injury nor reasonable probability of injury to competition in either the primary or the secondary line (R. 57), and (b) the challenged price differences were cost-justified (R. 74).

The Commission, in a decision joined in by only two of the five Commissioners, with one dissenting and two not participating, held that Borden brand and private label were of like grade and quality, that there was injury to competition in both the primary and secondary line, and that the respondent had not established its cost justification defense (R. 128).

The court of appeals decision that Borden brand and private label were not of like grade and quality. All issues were thoroughly briefed and argued before

the court of appeals, which on December 4, 1964 set the Commission's order aside on the threshold ground that Borden brand and private label were not of like grade and quality within the meaning of the statute (R. 985). It is that holding which is now before this Court for review.

The absence of competitive injury. Although the Commission in its brief (pages 10, 19-20) correctly emphasizes that the competitive injury issues are not before this Court, the Commission's extensive references to those issues necessitate a brief indication of the facts which led the hearing examiner to order the complaint dismissed for lack of competitive injury, and which led the court of appeals to observe, at the close of its opinion, that the respondent's arguments as to the absence of competitive injury "seem to have considerable merit" (R. 985).

As to the claimed injury in the producer or primary line of competition, the evidence showed some shifting of private label business to the respondent at plants where it had the geographic and freight advantage, and some shifting of such business away from the respondent in instances where competitors' plants were more advantageously located. The over-all result was that during the complaint period the testifying competitors, far from losing out, actually increased their market share, sold larger amounts of private label than before, and sold it at higher prices (R. 34-50, 753-88).*

* The competitor who ceased production (Comm. Br. 6) had an almost doubled sales volume in the very year when some of his business shifted to the respondent (which had the geographical advantage in respect of practically all of such shifted business); and that competitor's representative, as the hearing examiner noted, blamed his company's unfavorable geographic location, and not the respondent, for his company's decision to cease production (R. 41-42).

As to the claimed injury in the customer or secondary line of competition, the Commission proceeded on the assumption that, as in *Morton Salt**, the case involved goods which were alike in the market place as well as in physical composition. That assumption was manifestly incorrect, as the record shows and as the hearing examiner recognized; and the record further shows (see pages 30-33 below) that whatever competitive effects might be thought to have flowed from the selling of these two different products at different prices, they were of a totally different kind from those with which Congress was concerned: *viz.*, those resulting from the selling of like goods at different prices.

As to the respondent's cost justification defense, deemed sound by the hearing examiner after many months of litigation on that issue but rejected at the Commission level, the court of appeals observed at the close of its opinion that the respondent's arguments "seem to have considerable merit" (R. 985).

Introduction and Summary

The basic issue, as stated by the court of appeals (R. 979), "is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination." The court stated that "as a practical matter, such preferences may be far more significant in determining the market value of a product than are its physical characteristics", and that it is "both proper and consistent with the broad antitrust policy of Congress that they be given

* *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

recognition under the 'like grade and quality' test of the Act." The court concluded that

> "In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." (R. 980-81)

Applying that test to the thoroughly demonstrated facts of this case, the court of appeals found it apparent that Borden brand and private label were different products in the market place and therefore not of like grade and quality within the meaning of the statute. The Commission does not question that the market facts proved on this record, if taken into account, do indeed call for that conclusion. The Commission's complaint is that the court should have totally excluded the market facts from consideration.

The effect of the court of appeals decision is to permit the respondent to continue to make private label evaporated milk available to all who want it; to sell that product at prices determined by all the market factors relating to that product; and, in those areas where the proximity of the respondent's plant gives it an advantage over packers shipping from distant plants, to provide cheaper private label for those consumers who want to buy that product.

The effect of an affirmance of the court of appeals decision would be simply to reconfirm that market as well as physical facts are to be taken into account in making the jurisdictional determination under Section 2(a). The Commission would remain entirely free, as

always, to consider each new case on its own facts; and where such facts indicate mere artificial differences rather than the genuinely significant differences shown in this case, the Commission would have full power to deal with every evil at which the Robinson-Patman Act was directed, in precisely the manner intended by Congress.

Contrast, then, the position taken by the Commission before this Court.

The Commission does not and could not question that (a) Congress intended the prohibitions and restrictions of Section 2(a) to be applicable only where different prices are charged for the same product; (b) the threshold question is whether the different prices are being charged for the same product or for different products; and (c) where it is determined that the products are different, that is the end of the inquiry under the statute, and none of the ensuing provisions—competitive injury, meeting competition, cost justification, etc.—has any application.

Yet the Commission now asks this Court to lay down a flat rule that in determining the applicability of this statute no attention shall be paid to any of the market facts—the very facts that are of most crucial significance to actual buyers and sellers of products in the market place. No matter how thoroughly a separate market for a private label product may have been established; no matter how many other producers may be selling in that private label market; no matter how clearly it may be shown that all producers of private label must sell that product at substantially lower than premium product prices, if they are to sell at all; no

matter what plant location or other economic advantages a premium brand producer may be able to make available to wholesalers and retailers wishing to handle the private label product; no matter how many of such wholesalers and retailers may wish to handle the cheaper private label product which can thus be made available to them; no matter what lower prices can thus be brought about for customers who may wish to buy the cheaper private label product—none of this, under the flat exclusionary rule sought by the Commission, would make any difference.

Under that rule, no seller operating in a premium product market could sell private label with an eye solely to the market for that product. At every turn, such a seller would have to keep an eye to the competitive fortunes of all other private label producers, being careful not to sell to any wholesaler or retailer in circumstances which might later be claimed to have harmfully diverted business away from some other less advantageously situated private label producer. And at the same time, such a seller would have to keep an eye to the situation of each of his customers, lest for example it later be claimed that a customer to whom sales of private label could not be made for fear of diverting business from some primary line competitor was harmed in his competition with some other customer. In short, under the rule sought by the Commission, no seller operating in a premium product market could compete in a private label market except at the risk of expensive and protracted "injury" and "cost justification" litigation, and under the peril of severe injunc-

tive restrictions, if the Commission in the light of information developed at the trial should formulate conclusions adverse to the seller.

Needless to say, a rule so obviously fostering "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"* should not be adopted unless clearly compelled by the statutory language itself, the legislative history, the over-all statutory design, or established judicial or administrative precedent.

The fact is that every one of these criteria compels the contrary conclusion and supports the decision of the court of appeals. The language of Section 2(a), considered in the light of the statutory purpose and legislative history, shows that the question whether goods are "of like grade and quality" so as to be within the reach of the statute turns upon the facts as to whether the goods have the same value in the market so that they would normally be sold at the same price. Mere physical similarity is not enough if in fact the goods cannot command the same prices in the channels of distribution.

This view of the statute is consistent with all the administrative and judicial precedents and with the design and objectives of the Robinson-Patman Act. It also serves to harmonize that Act with the broader antitrust policies laid down by Congress by leaving producers free to compete at price levels resulting from the normal play of market forces.

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* *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 63 (1953).

ARGUMENT

I. The Court of Appeals Correctly Held, on the Record before it, That Private Label Evaporated Milk Was Not of Like Grade and Quality with Borden Brand Milk.

A. Congress intended that the market facts as well as the physical facts should be taken into account in determining whether Section 2(a) may have any application.

The language of the statute. The subject matter of Section 2(a) is prices at which commodities are sold. The section, however, is not a general price-fixing or regulatory statute. It deals only with the charging of different prices for "commodities of like grade and quality." Determinations of *grade* and *quality* are essentially value judgments. They have to do with the relative acceptability of goods, which may be based upon physical differences or upon other factors deemed important by buyers and sellers of goods in the market.

Congress desired to protect small buyers against harmful uses of the buying power of large firms, and at the same time did not intend to interfere with the normal competitive processes whereby prices are determined by the actions of buyers and sellers in the market. The statutory language is well designed to carry out these intentions. The jurisdictional phrase limits the prohibitions of the statute to situations where different prices are being charged for goods which all buyers would normally expect to be able to get at the same price. At the same time, the jurisdictional words "make it clear that a seller may charge different prices for

products having significant variations in grade and quality"*, and therefore normally selling at different prices.

It is an unquestioned fact that the marketability of a product and the price at which it can be sold depend not only on its physical characteristics but also on the opinion in which buyers hold it. This was brought out by Judge Learned Hand in a decision under another trade regulation statute, handed down at the time when the Robinson-Patman amendment was pending before Congress. Judge Hand emphasized the significance of consumer preferences grounded in considerations other than physical differences, as follows:

> "Commercially the [advertised] brands had come to mean a better grade of milk, for the hygienic properties of a product do not fix its commercial quality, but the opinion in which buyers hold it." *Borden's Farm Products Co.* v. *Ten Eyck*, 11 F. Supp. 599, 600 (S.D.N.Y. 1935), *aff'd*, 297 U.S. 251 (1936)

The Commission itself has recognized the same thing as recently as 1964. In *Callaway Mills*** the Commission pointed out, in a case involving Section 2(b), that a realistic comparison of the pricing of two products must take into account not only the "intrinsic superior quality" of one product over another but also the "intense public demand" that may exist for one product as compared with another. Expressly relating these two distinct considerations to the "grade and

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* Comm. Br. 12.

** *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800 (FTC Dkt. 7634, Feb. 10, 1964).

quality" of the products, the Commission assigned to the "quality" concept the "intrinsic" or physical characteristics of a product, and to the "grade" concept the "public demand" or "saleability" characteristics of a product. TRADE REG. REP. TRANSFER BINDER, at p. 21, 755.

Likewise some members of the Attorney General's National Committee to Study the Antitrust Laws, urging that "significant consumer preferences" be taken into account under the grade and quality provision of the statute, regarded demonstrable economic differences as calling for evaluation "under the statutory term 'grade' as distinct from any purely physical consideration of 'quality'."*

To the same effect is Rowe. Pointing out that products are not of like grade and quality if there are commercially significant differences between them, Rowe emphasizes the statutory term "grade" as encompassing these market value factors. Rowe's statement is as follows:

> "Considerations of 'quality' aside, the requirement of 'like grade,' whose real import was never legislatively clarified, appears sufficiently plastic to take account of any other commercially significant distinctions—whether physical or promotional differentiations affecting market value. 'Like grade' is thus readily equated with 'commercial fungibility.'
>
> "So construed, the statutory condition of 'like grade' would exempt those non-'fungible' goods differentiated significantly in physical components or promotional appeal." Rowe, Price Discrimination Under the Robinson-Patman Act 76 (1962)

* Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955).

Regardless of the precise connotation to be assigned to each of the two terms, the fact that Congress used both terms undoubtedly strengthens the view that Congress intended that the jurisdictional determination should not be limited to the consideration of physical facts alone but should encompass all factors affecting value. The view is further strengthened by the fact that the original Clayton Act permitted a seller to defend his differing prices on the grounds, among others, that the commodities were different in "grade" or in "quality". 38 Stat. 730 (1914). The Robinson-Patman amendment retained both conditions, stated them in the conjunctive and put upon the plaintiff the burden of proof. Thus, under the original Clayton Act the defendant could justify his price discrimination by showing differences in either grade or quality. Under the Robinson-Patman amendment the plaintiff must demonstrate likeness in both grade and quality.

The legislative history. The legislative history, far from providing support for the Commission's contention that all market facts are to be totally excluded from the jurisdictional determination under the statute, shows exactly the contrary. The history shows that "grade" and "quality" remained as separate criteria under the Robinson-Patman Act, and thus that products different in grade or different in quality were not to be deemed of like grade and quality under the statute. Further the history evidences the Congressional concern that the actual facts as to the standing of products in the market place, and not mere rules of thumb based on the presence or absence of physical differences or of

particular brand names, should be controlling. And finally, the history shows that there was specific consideration and approval of the very kind of premium brand-private label operation which the Commission has challenged in this present case.

Mr. Teegarden, generally recognized as the draftsman of the statute (Comm. Br. 14),* explained the significance of market as distinguished from purely physical facts in determining the applicability of the statute, and sharply differentiated between "different grades" on the one hand and "different qualities" on the other, in the following language:

> "27. Question. Would the proposed amendment [the Patman bill] require the same prices and terms on purchases for future delivery as on spot purchases either at the time of the contract or at the time of the delivery?
>
> "Answer. No. The bill does not affect the relationship between future and spot purchases. They are different things and are based on *market conditions* at different times or relating to different times. It would require equal treatment of spot buyers of the same goods at the same time. It would require the equal treatment of future buyers of the same goods, buying at the same time and in the same future. But it leaves open and un-

* Mr. Teegarden, whose authorship of the Patman bill was expressly confirmed by Congressman Patman (*Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess., ser. 10, pt. 1, at 9 (1935)), was active before the various Committees of the Congress throughout the consideration of the legislation, as shown, for example, *id.* at 14-29, 30-39, 200-36, 244-69 and in the *Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 2d Sess., ser. 10, pt. 2, at 446-70 (1936).

> touched the prices and terms relationship between different futures and between spots and futures, just as it does between *different grades* and *different qualities.* No protection is needed in this respect, since if a seller offers a price differential disproportionate to the real differences involved, the buyer can always choose the future *or the grade or the quality* offering the best price and terms." *Hearings before the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 1st Sess., ser. 10, pt. 1, at 36 (1935) [Italics added.]

The rejection of the "and brands" proposal, relied upon by the Commission at pages 14-15 of its brief, is further evidence that no formalistic rules of thumb were to be employed in the application of the jurisdictional criteria. Under that proposal, Section 2(a) would have been applicable only to the charging of different prices for "commodities of like grade, quality and brand." Obviously the adoption of that proposal would have meant that any difference in brands, regardless of the actual standing of the products in the market place, would have been conclusive and inquiry into the market facts would have been foreclosed. That was of course not the Congressional intention, for as the court of appeals has pointed out in this present case (R. 982), "Different labels may be of no economic significance whatsoever" and "[i]t is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product."

The legislators made it clear that there was to be no change in the status of brands which commanded higher prices, and which for that reason were different in

grade or quality from non-premium brands. The stated reason for rejecting the "and brands" proposal was to prevent discrimination among private label purchasers. Congress, for example, intended that a packer of canned fruit should not be able to sell that product to one large chain under that company's private label at one price, and at the same time charge any other customer a higher price for the product under its private label.

Mr. Teegarden made the following statement on this subject:

> "To amend the bill by inserting 'and brands', after the words 'commodities of like grade and quality', as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitations whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discrimination that he might demand.
>
> "Under the Patman bill as it stands, *manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under*

> *his private brand;* and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed." *Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 2d Sess., ser. 10, pt. 2, at 469 (1936) [Italics added.]

The attention of Congress could hardly have been focused more specifically upon the precise situation now presented. When the respondent put up evaporated milk under the private labels of the purchasers, and stood ready to do so, under its same cost-plus pricing formula, for each competing purchaser under his private label, it was doing exactly what the chief architect of the Robinson-Patman amendment declared that manufacturers would be free to do thereunder.*

So, too, with the role of *Goodyear*** in the legislative history (Comm. Br. 15-16). It supports the conclusion of the court of appeals, not the Commission's contention. The market facts were gone into on the jurisdictional issue in that case, just as the court of appeals did

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* The obviously offhand statement of Mr. Patman ("I only have a very short time, and I must finish my statement. I have not time to discuss that feature . . .") quoted in part at pages 13-14 of the Commission's brief, is in no way inconsistent. The Commission is in error in suggesting that Mr. Patman was speaking of both grade and quality. He spoke solely of "the same quality", and his statement contains no intimation that products of different grades (*e.g.*, a premium brand and a private label) would have to be sold at the same price. The more considered and definitive statement on the same subject, made by the man whose authorship of the Patman bill was expressly confirmed by Congressman Patman, is the one quoted above, expressly sanctioning the very kind of premium brand-private label operation which is involved in the present case.

** *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), *rev'd*, 101 F. 2d 620 (6th Cir.), *cert. denied*, 308 U. S. 557 (1939).

in the present case.* The result was of course different, because the market facts were different.**

B. The court of appeals decision is in full accord with every administrative and judicial precedent.

The court of appeals emphasized in its opinion (R. 982) that different labels may be of great commercial significance or of no economic significance whatever, depending on the facts in each case. As the court put it in *Atalanta Trading Corp.* v. *FTC,* 258 F.2d 365, 371 (2d Cir. 1958), the question is whether the differences between products are merely "artificial" differences or real differences. The issue in that case was whether certain particular pork products, such as "specially packaged gift-wrapped 2¼ and 5 lb. hams," were of like grade and quality with other pork products. In the Commission it had been held that they were, on the ground that "ham is ham"—just as in the present case the Commission has in effect held that evaporated milk is evaporated milk. The court, pointing out among other things that the Commission had failed to take account of the prices at which the products sold, cate-

* FTC Dkt. 2116, Brief of Counsel Supporting the Complaint in Opposition to Respondent's Motion to Dismiss, pp. 2-6; Respondent's Brief in Support of Motion to Dismiss, pp. 5-9.

** In *Goodyear,* the evidence showed that the private label purchaser (Sears) had in fact been trading on Goodyear's name, thus getting from Goodyear the same commercial value that was obtained by Goodyear customers who had paid a higher price for goods bearing Goodyear's name. The Commission found that in the Sears advertisements "the source of supply was described as 'the leading tire manufacturer' or 'the world's foremost tire manufacturer' "; and that "soon after the contract had been made between Sears, Roebuck & Co. and respondent, that fact became known to the trade and somewhat later to a large proportion of the purchasing public." 22 F.T.C. at 295, 297.

gorically rejected the Commission's decision and set its order aside.

To real people in the market place, the substantial premium differential commanded by Borden brand as compared with private label is most assuredly not an artificial difference. Paying substantially more for one product than for another is a very real thing, to any businessman; he will do that only if the higher priced product is actually worth that much more to him in his business. That is precisely what was done by the private label purchasers in the present case. With both products fully available to them, they kept right on buying Borden brand at the higher prices, in undiminished quantities, as well as private label at the lower prices.

Throughout the history of the Robinson-Patman Act the Commission has recognized—as have the courts—that the higher price commanded by a premium product is a very real thing, and not a mere artificial difference. Time and again, in cases involving the closely related "meeting competition" defense under Section 2(b), the Commission has insisted upon taking full cognizance of the premium differential. Without exception, the Commission has held that because of the premium differential existing in the market place, a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition but undercutting it.

The *Callaway Mills* case (pages 15-16 above) is the most recent example. Rejecting that seller's "meeting competition" defense on the ground that it had failed

to prove that its carpeting was "similar in grade and quality" to the carpeting of the competitors whose prices it was meeting, the Commission emphasized that:

> "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods." CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800, at p. 21755.

Further Commission and court decisions to the same effect include *Standard Oil Co.*, 49 F.T.C. 923 (1953),* *rev'd on other grounds*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958); *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957),** *rev'd*, 265 F.2d 677 (7th Cir. 1959), *rev'd and remanded to court of appeals*, 363 U.S. 536 (1960), *Comm'n again rev'd*, 289 F.2d 835 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), *rev'd on other grounds*, 191 F.2d 786 (7th Cir. 1951), *petition for cert. dismissed*, 344 U.S. 206 (1952); and *Gerber Prods. Co.* v. *Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916 (S.D.N.Y. 1958).

In each of those decisions the crucial fact was that the premium product commanded a higher price. In

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* ". . . in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor." 49 F.T.C. at 952.

** "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market". 54 F.T.C. at 302.

none of them did the result turn on any question whether the higher price was due to a greater public demand for the premium product or to some differences in its composition.

In the present case, the Commission has held that the higher price commanded by a premium product is of no significance and must be disregarded in determining the applicability of the statute. The court of appeals could find no warrant for the Commission's thus "construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case" (R. 984); and the Commission in its brief has advanced none. The Commission's attempt to distinguish the long line of precedents (Comm. Br. 25-27) comes down to nothing but an assertion that the standards under Section 2(b) and Section 2(a) of the same statute are "different". In what respect the standards differ, so as to justify a vigorous pursuit of the market facts under Section 2(b) and a total rejection of them under Section 2(a), the Commission does not say.

Equally unpersuasive is the Commission's assertion (Comm. Br. 22-24) that there is a "well-settled administrative interpretation" which may explain its refusal to consider the market facts in this case. The court of appeals, before which the Commission made the same assertion, pointed out that in none of the cases cited by the Commission "was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower price did not." (R. 981-82). The Com-

mission in its brief does not question the accuracy of that statement. Nor does the Commission quote or refer to any instance where the rule now said to be well settled has been stated by the Commission.

A review of the cited cases yields no enlightenment as to any Commission interpretation, let alone any "well settled" one. One of the cases was a negotiated settlement.* In another, the evidence affirmatively showed that there was no commercial difference between the two products, in that the resale prices of both were the same.** In two more, the Commission indicated doubt whether the labels themselves were readily distinguishable.*** In still another, the Commission stipulated facts showing cost justification, as to all issues involving private labels, and the accompanying finding of "like grade and quality" was obviously pro forma.†

C. The court of appeals decision gives effect to the broader antitrust policies that have been laid down by Congress.

The Commission, at page 21 of its brief, recognizes that the widespread distribution of private label merchandise "has enabled millions of consumers to enjoy

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* *United States Rubber Co.*, 28 F.T.C. 1489 (1939).

** *Whitaker Cable Corp.*, 51 F.T.C. 958, 975 (1955).

*** *Hansen Innoculator Co. Inc.*, 26 F.T.C. 303, 308-9 (1938); *Page Dairy Co.*, 50 F.T.C. 395, 397 (1953).

† *United States Rubber Co.*, 46 F.T.C. 998, 1011-12 (1950).

International Salt Co., 49 F.T.C. 138 (1952), to which the Commission makes a "cf." reference, involved no question of different prices for differently labeled goods.

the benefits of lower prices." It must also be recognized that effective competition and resulting lower prices for private label products depend largely upon the freedom of producers to sell these products at prices determined by the demands and conditions of the private label market. Yet the position advocated by the Commission would limit this freedom. If that position were to prevail, producers of a premium product could not also compete in the private label market except at the risk of litigation under the Robinson-Patman Act.

The reasons asserted by the Commission for a position thus limiting competitive freedom are not unlike the reasons which were unsuccessfully asserted in *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953). There the issue was whether, in a proceeding under Section 2(f) of the Robinson-Patman Act, the Commission or the defending recipient of a lower price had the burden of coming forward with facts as to the seller's costs and other evidence. The Commission argued that enforcement of the Act would be simplified if that burden were put on the defending recipient rather than on the Commission—just as the Commission in the present case seeks a simple exclusionary rule under which the Commission would not have to consider any of the market facts in determining the applicability of the statute.

This Court rejected the Commission's contention. It pointed out that the simplified enforcement sought by the Commission "might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." (*id* at 63.)

The freedom of competition was protected by the Court's refusal to put "the buyer at his peril whenever he engages in price bargaining." (*id* at 73.) The basic point of the decision was that the Robinson-Patman Act should be interpreted and applied consistently "with broader antitrust policies that have been laid down by Congress." (*id* at 74.)

Similar considerations are applicable here, as the court of appeals noted (R. 980-81). Under the simple rule sought by the Commission, a producer who happened also to be in the premium brand market would be foreclosed from competing, in the private label market, with an eye solely to the market for the private label product. He would in addition have to be mindful of the competitive fortunes and situations of each of his competitors and customers, all at the risk of protracted and expensive litigation and at the peril of severe restrictive orders if it should later be concluded that "the competitive balance" was "shifted" (Comm. Br. 6). The scope of that risk and the reality of the peril are made clear by the long history of this litigation and the sweeping order issued by the Commission (R. 952-53).*

Nothing in the Robinson-Patman Act justifies the conclusion that Congress intended such an impact on

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* In its brief (pages 17-18) the Commission goes outside the record for some materials which are said to indicate a more widespread interest in private brand merchandise, generally, than the record facts show with respect to evaporated milk. That, we suggest, would make it even more imperative that all potential producers of private label be permitted to compete fully and effectively in such markets, without being subjected to the restrictions inherent in the exclusionary rule for which the Commission contends in this case.

competition. Section 2(a) of the Robinson-Patman Act, applied in accordance with its terms, imposes restrictions on price differentiation only in those situations where the market itself does not make a differentiation; that is to say, only in those situations where a seller sells to one purchaser at a higher price, and to another purchaser at a lower price, like goods which would normally command the same price.

But where as in this present case the market itself dictates that the products be sold at different prices, and a seller must sell the one at a lower price if he is to sell it at all, the statute has no application whatsoever and imposes no actual or threatened restriction of any kind on a seller's full and effective competition in each of the product markets. He is free to make private label available to all of his customers who want that product, without regard to any effect that that may have on competitors presently supplying any of such customers; and he is free to sell that product at lower prices reflecting and making available for consumers the benefits of plant location and other economic advantages that he may have.

D. The court of appeals decision is in full accord with the overall statutory design.

The statutory design is perfectly clear. Unless products are alike in grade and quality, the statute has no application whatsoever in respect of a seller's pricing of them, and no inquiry under the injury or any of the other provisions of the statute is authorized or contemplated.

As the Commission puts it:

> "Congress explicitly did not prohibit a seller from charging less for a different product." (Pet. Cert. 9) * * * * *
>
> "A seller may charge different prices for products having significant variations in grade and quality —such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act." (Comm. Br. 12)

Comparison of this present case with the situation presented in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), relied upon by the Commission (Comm. Br. 17, 19), illustrates the difference in kind between the competitive effects of selling different products at different prices, and the injurious impact of selling the same product at different prices.

In *Morton Salt* the goods sold to competing customers at different prices were alike in the market place as well as in physical composition. This Court, repeatedly characterizing these as "like goods",* made it clear that one of the things that made them "like goods" was that the brand name was the same: Morton's "finest brand of table salt, known as Blue Label." After setting out at page 41 the volume discount schedule applicable to "this brand" and noting that the record in that case showed that there had been only five companies able to purchase at the lowest prices thus provided for, this Court stated that:

> "As a result of this low price these five companies have been able to sell Blue Label salt at retail

* 334 U.S. at 45, 47, 50.

cheaper than wholesale purchasers from respondent could reasonably sell *the same brand* of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores.'"* [Italics added.]

It was self-evident that both groups of customers—those charged the higher prices and those charged the lower prices—would ordinarily expect to pay the same price for that Blue Label salt. It was likewise self-evident that both groups of customers in fact wanted Blue Label salt. They were already buying it. And, as noted in the foregoing quotation from this Court's opinion, the competitive disadvantage to those paying the higher price for that same brand of salt was equally obvious.

In the present case, in total contrast, the goods were quite unlike in the market place. No wholesaler or retailer expected to get Borden brand for the private label price. All wholesalers and retailers carried Borden brand. Their customers demanded it, and it was a necessary part of their stock in trade. Private label was an optional item; some chose to carry it and some did not. Borden brand was a pre-sold item, requiring little selling effort on the part of the handlers. Private label on the other hand required extensive selling and promotional efforts, and the record shows that those who did handle the product did not always

* Following this, this Court at page 41 described the quantity discount system applicable to Morton's "other brands" of table salt, and noted the price differences among purchasers of such other brands.

consider that their efforts had been warranted. On the other hand the mark-ups for the handlers, on Borden brand, were modest, while in some circumstances the handling of private label held out the hope of greater margins. Private label also provided an opportunity for a handler to develop a good will in a product of his own; Borden brand did not (R. 51-57, 431-35, 455-56, 464-65, 478-81).

The hearing examiner, who observed the Commission's wholesaler and retailer witnesses on the stand and analyzed the evidence in detail, found the Commission's case thoroughly unpersuasive and held that there was no competitive injury.* The Commission, proceeding on the erroneous premise that this was another *Morton Salt* case, involving goods which were alike in the market place as well as in physical composition, concluded otherwise. The court of appeals, while not deciding the question, stated that the respondent's arguments in support of the hearing examiner's conclusion "seem to have considerable merit" (R. 985).

For present purposes the important point is that (as the Commission admits) the Congress did not intend

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* R. 57. The hearing examiner considered the statements of the Commission's witnesses, referred to at page 7 of its brief, to the effect that they would have been interested in buying private label from the respondent if they had been solicited. He also considered the evidence as to the actual business conduct of these witnesses, including evidence showing that most of them had never handled private label at all, although it had been in distribution in their area for over 30 years, evidence showing that many of the retailer witnesses had failed to buy the product when it was offered to them by wholesalers purchasing from the respondent (or had waited to do so, until shortly before their testimony), etc. (R. 50-57, 288-90).

that any competitive effects flowing from the selling of different products at different prices should be inquired into at all. They are not "the kind" of effects with which Congress was concerned (Comm. Br. 12). And the facts in this case clearly show that where, as here, the products are radically different in the market place, any competitive effects are indeed different in kind from the *Morton Salt* type to which the statute is directed.

We submit that Congress did not intend, on the one hand, to leave a seller free to sell different products at competitively different prices, and then on the other hand to take away that freedom by permitting the Commission to subject the seller to protracted and uncertain litigation about alleged competitive effects. Cf. *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951).

II. The Court of Appeals Decision Leaves the Commission Entirely Free to Discharge All of its Responsibilities under the Statute, as Congress Intended.

Much of the argument in the Commission's brief is directed to a concern that the decision below may impede the Commission in its handling of other cases which may arise in the future.

The effect of the court of appeals decision, so far as future cases are concerned, is simply to reconfirm that market as well as physical facts are to be taken into account. The decision leaves the Commission free, as always, to consider each new case on its own facts. Where such facts indicate mere artificial differences rather than the genuinely significant differences shown

in this present case, the Commission as always will have full power to deal with every evil at which the Robinson-Patman Act was directed, in precisely the manner intended by Congress.

If examples are needed, the court of appeals has already furnished one. In *Hartley & Parker** the court of appeals found the differently labeled goods to be of like grade and quality. That conclusion, reached on the facts of that case, in no way tied the court's hands in respect of the quite different market facts in the present case; and Judge Rives, who wrote the opinion in *Hartley,* joined in the unanimous decision in the present case.

If and when another *Goodyear* situation arises (see pages 21-22 above), with a single large purchaser of private label buying at a lower price but trading on and getting the benefit of the well-known brand name, nothing in the decision below will hamper the Commission in dealing fully and effectively with that case.

So too, with the hypothetical situation posed at page 19 of the Commission's brief, involving a supposed predatory use accomplished by "simply . . . calling it Brand X instead of Brand A." The court of appeals made it clear that the mere affixing of different labels means nothing at all, because "different labels may be of no economic significance whatsoever" (R. 982). The facts in the present case are totally different, and it is hard to see how the decision below could give rise to any problem in dealing with the hypothetical case if it should arise.

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* *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

But even if it were to be thought that consideration of the market as well as the physical facts might call for some substantial amount of effort on the Commission's part, that could by no means justify the alternative, of which this case is an example: eight years of complex and expensive litigation about competitive effects claimed to have flowed from the differential pricing of products which were radically different in the market place, pursuing the complexities involved in establishing cost justification under the Commission's procedures, etc. Inquiry into the market facts at the outset, as Congress intended, could have obviated all of this with but a small fraction of the time and effort.

Conclusion

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1965.

Federal Trade Commission, Petitioner, *v.* The Borden Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 23, 1966.]

Mr. Justice White delivered the opinion of the Court.

The Borden Company, respondent here, produces and sells evaporated milk under the Borden name, a nationally advertised brand. At the same time Borden packs and markets evaporated milk under various private brands owned by its customers. This milk is physically and chemically identical with the milk it distributes under its own brand but is sold at both the wholesale and retail level at prices regularly below those obtained for the Borden brand milk. The Federal Trade Commission found the milk sold under the Borden and the private labels to be of like grade and quality as required for the applicability of § 2 (a) of the Robinson-Patman Act,[1] held the price differential to be discriminatory

[1] Section 2 (a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (a) (1964 ed.), provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to

within the meaning of the section, ascertained the requisite adverse effect on commerce, rejected Borden's claim of cost justification and consequently issued a cease-and-desist order. The Court of Appeals set aside the Commission's order on the sole ground that as a matter of law, the customer label milk was not of the same grade and quality as the milk sold under the Borden brand. 339 F. 2d 133. Because of the importance of this issue, which bears on the reach and coverage of the Robinson-Patman Act, we granted certiorari. 382 U. S. 807. We now reverse the decision of the Court of Appeals and remand the case to that court for the determination of the remaining issues raised by respondent Borden in that court. Cf. *Federal Trade Comm'n* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542.

The position of Borden and of the Court of Appeals is that the determination of like grade and quality, which is a threshold finding essential to the applicability of § 2 (a), may not be based solely on the physical properties of the products without regard to the brand names they bear and the relative public acceptance these brands enjoy—"consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." 339 F. 2d, at 137. Here, because the milk bearing the Borden brand regularly sold at a higher price than did the milk with a buyer's label, the court considered the products to be "commercially" different and hence of different "grade" for the purposes of § 2 (a), even though they were physi-

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lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said commodities are to such purchasers sold or delivered . . . ."

cally identical and of equal quality. Although a mere difference in brand would not in itself demonstrate a difference in grade, decided consumer preference for one brand over another, reflected in the willingness to pay a higher price for the well-known brand, was, in the view of the Court of Appeals, sufficient to differentiate chemically identical products and to place the price differential beyond the reach of § 2 (a).

We reject this construction of § 2 (a), as did both the examiner and the Commission in this case. The Commission's view is that labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public. That this is the Commission's long-standing interpretation of the present Act, as well as of § 2 of the Clayton Act before its amendment by the Robinson-Patman Act,[2] may be gathered from the Commission's decisions dating back to 1936. *Whitaker Cable Corp.*, 51 F. T. C. 958 (1955); *Page Dairy Co.*, 50 F. T. C. 395 (1953); *United States Rubber Co.*, 46 F. T. C. 998 (1950); *United States Rubber Co.*, 28 F. T. C. 1489 (1939); *Hansen Inoculator Co.*, 26 F. T. C. 303 (1938); *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232 (1936). These views of the agency are entitled to respect, *Federal Trade Comm'n* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 391, and represent a more reasonable construction of the statute than that offered by the Court of Appeals.[3]

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[2] A proviso to § 2 of the original Clayton Act excepted price discrimination "on account of differences in the grade, quality, or quantity of the commodity sold . . . ." 38 Stat. 730 (1914).

[3] The commentators are somewhat divided on the dispute involved in this case. Supporting the Commission's view are the Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, 39 (2d ed. 1959); Patman, The

Obviously there is nothing in the language of the statute indicating that grade, as distinguished from quality, is not to be determined by the characteristics of the product itself, but by consumer preferences, brand acceptability or what customers think of it and are willing to pay for it. Moreover, what legislative history there is concerning this question supports the Commission's construction of the statute rather than that of the Court of Appeals.

During the 1936 hearings on the proposed amendments to § 2 of the Clayton Act, the attention of the Congress was specifically called to the question of the applicability of § 2 to the practice of a manufacturer selling his product under his nationally advertised brand at a different price than he charged when the product was sold under a private label. Because it was feared that the Act would require the elimination of such price differentials, Hearings on H. R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 355, and because private brands "would thus be put out of business by the nationally advertised brands," it was suggested that the proposed § 2 (a) be amended so as to apply only to sales of commodities of "like grade, quality and *brand*." (Emphasis added.) *Id.*, at 421. There was strong objection to the amendment and it was not adopted by the Committee.[4] The rejection of this

Robinson-Patman Act, 27 (1938); Edwards, The Price Discrimination Law, 31, 463–464 (1959); Seidman, Price Discrimination Cases, reprinted in 2 Hoffmann's Antitrust Laws and Techniques, 409, 424–428 (1963). Contrary views are expressed by a minority of the Attorney General's Committee; in Rowe, Price Discrimination under the Robinson-Patman Act, 75 (1962); and in Cassady and Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2 (a) of the Robinson-Patman Act, 30 So. Calif. L. Rev. 241 (1957).

[4] Mr. H. B. Teegarden, who was then counsel to the United States Wholesale Grocers Association, and who apparently played a large

amendment assumes particular significance since it was pointed out in the hearings that the legality of price differentials between proprietary and private brands was then pending before the Federal Trade Commission in *The Goodyear Tire & Rubber Co.*, 22 F. T. C. 232. By the time the Committee Report was written, the Commission had decided *Goodyear*. The report quoted from the decision and interpreted it as holding that *Goodyear* had violated the Act because "at no time did it offer to its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 4.

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part in drafting the bill, Hearings on H. R. 4995 before the House Committee on the Judiciary, 75th Cong., 1st Sess., p. 9, supplemented his oral testimony with a letter addressed in part to the proposed amendment:

"To amend the bill by inserting 'and brands,' after the words 'commodities of like grade and quality,' as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

"Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed."

During the debates on the bill, Representative Patman, one of the bill's sponsors, was asked about the private label issue. His brief response is wholly consistent with the Commission's interpretation of § 2 (a), 80 Cong. Rec. 8115:

> "Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?
>
> "Mr. PATMAN. . . . I have not time to discuss that feature, but the bill will protect the independents in that way, because they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package, and this will remedy the situation to which the gentleman refers.
>
> "Mr. TAYLOR of South Carolina. Irrespective of the brand.
>
> "Mr. PATMAN. Yes; so long as it is the same quality. . . ."

The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. Subject to specified exceptions and defenses, § 2 (a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers or both. Such

transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of § 2 (a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.[5]

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2 (a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition. Those who were offered only one of the two products would be barred from competing for those customers who want or might buy the other. The retailer who was permitted to buy and sell only the more expensive brand would have no chance to sell to those who always buy the cheaper product or to convince others, by experience or otherwise, of the fact which he and all other dealers already know—that the cheaper product is actually identical with that carrying the more expensive label.

The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be. The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference

[5] Borden argues that it spends large sums to ensure the high quality of its Borden brand milk on customers' shelves, inferring that there really is a difference between its own milk and the milk sold under private labels, at least by the time it reaches the consumer. Of course, if Borden could prove this difference, it is unlikely that the case would be here. The findings are to the contrary in this case and we write on the premise that the two products are physically the same at the time of consumer purchase. Borden's extra expenses in connection with its own milk are more relevant to the cost justification issue than to the question we have before us.

in "grade" and thus taking itself beyond the purview of the Act.[6]

Our holding neither ignores the economic realities of the marketplace nor denies that some labels will command a higher price than others, at least from some portion of the public. But it does mean that "the economic

[6] The market acceptability test would hardly stop with insulating from inquiry the price differential between proprietary and private label sales. That test would also immunize from the Act sales at different prices of the same product under two different producer-owned labels, the one being less advertised and having less market acceptability than the other. And if it is "consumer preferences," dissenting opinion, p. 1, which create the difference in grade or quality, why should not Borden be able to discriminate between two purchasers of private label milk, as long as one label commands a higher price from consumers than the other and hence is of a different grade and quality? In this context perhaps the market acceptability test would be refined to preclude this differential on the grounds that Borden's customer, as distinguished from the consumer, will not pay more than his competitor for private label milk and therefore the milk sold by Borden under one private brand is really of the same grade and quality as the milk sold under the other brand even though ultimate consumers will pay more for one than the other. Taking this approach, if Borden packed for one wholesale customer under two private labels, one having more consumer appeal than the other because of the customer's own advertising program, Borden must sell both brands at the same price it charges other private label customers because all such milk is of the same grade and quality. At the same time, the customer buying from Borden under two labels could himself sell one label at a reduced price without inquiry under § 2 (a) because the milk in one container is no longer of the same grade and quality as that in the other, although both the milk and the containers came from Borden. Such an approach would obviously focus not on consumer preference as determinative of grade and quality but on who spent the advertising money that created the preference—Borden's customer, not Borden, created the preference and hence the milk is of the same grade and quality in Borden's hands but not in its customer's. The dissent would exempt the effective advertiser from the Act. We think Congress intended to remit him to his defenses under the Act, including that of cost justification.

factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test." Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955). And it does mean that transactions like those involved in this case may be examined by the Commission under § 2 (a). The Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost justified or is defensible as a good-faith effort to meet the price of a competitor. "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute." Report of The Attorney General's National Committee to Study the Antitrust Laws 159 (1955). This, we think, is precisely what Congress intended. The arguments for exempting private brand selling from § 2 (a) are, therefore, more appropriately addressed to the Congress than to this Court.[7]

The Court of Appeals suggested that the Commission's views of like grade and quality for the purposes of § 2 (a) cannot be squared with its rulings in cases where a seller presents the defense under § 2 (b)[8] that he is in good

[7] This is not, of course, a helpful suggestion to those who think the congressional remedy would be "very difficult if not impossible" and who thus prefer the more "reasonable approach" through the courts. See *Cassady* and *Grether*, *supra*, n. 3, at 277.

[8] Section 2 (b), U. S. C. § 13 (b) (1964 ed.), provides as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order

faith meeting the equally low price of a competitor.[9] In those cases, it is said, the Commission has given full recognition to the significance of the higher prices commanded by the nationally advertised brand "in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it." 339 F. 2d., at 138.

The Commission, on the other hand, sees no inconsistency between its present decision and its § 2 (b) cases. In its view, the issue under § 2 (b) of whether a seller's lower price is a good-faith meeting of competition involves considerations different from those presented by the jurisdictional question of "like grade and quality" under § 2 (a).

We need not resolve these contrary positions. The issue we have here relates to § 2 (a), not to § 2 (b), and we think the Commission has resolved it correctly. The § 2 (b) cases are not now before us and we do not venture to decide them. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[9] The Court of Appeals relied upon *Callaway Mills Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶16,800; *Anheuser-Busch, Inc.*, 54 F. T. C. 277 (1957); *Standard Oil Co.*, 49 F. T. C. 923 (1953); and *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948). Borden adds *Gerber Products Co.* v. *Beech-Nut Life Savers Co.*, 160 F. Supp. 916 (D. C. S. D. N. Y. 1958).

SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1965.

Federal Trade Commission, Petitioner, *v.* The Borden Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 23, 1966.]

Mr. Justice Stewart, with whom Mr. Justice Harlan joins, dissenting.

I cannot agree that mere physical or chemical identity between premium and private label brands is, without more, a sufficient basis for a finding of "like grade and quality" within the meaning of § 2 (a) of the Robinson-Patman Act. The conclusion that a product that travels at a premium in the market place is of "like grade and quality" with products of inferior commercial value is not required by the language of the Robinson-Patman Act, by its logic, or by its legislative history.

It is undisputed that the physical attributes and chemical constituents of Borden's premium and private label brands of evaporated milk are identical. It is also undisputed that the premium and private label brands are not competitive at the same price, and that if the private label milk is to be sold at all, it must be sold at prices substantially below the price commanded by Borden's premium brand.[1] This simple market fact no more than reflects the obvious economic reality that consumer preferences can and do create significant commer-

[1] For example, one wholesaler, a witness for the Commission, stated:

"Private label merchandise is no good for nobody unless there is a price on it . . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 or 25 cents a case under, it wouldn't sell, they couldn't give it away . . . . It has got to have $1.50 or $2 a case spread to make it interesting."

cial distinctions between otherwise similar products. By pursuing product comparison only so far as the result of laboratory analysis, the Court ignores a most relevant aspect of the inquiry into the question of "like grade and quality" under § 2 (a): Whether the products are different in the eyes of the consumer.[2]

There is nothing intrinsic to the concepts of grade and quality that requires exclusion of the commercial attributes of a product from their definition. The product purchased by a consumer includes not only the chemical components that any competent laboratory can itemize, but also a host of commercial intangibles that distinguish the product in the market place.[3] The premium paid

[2] No suggestion is made that any of the private label brands involved in this case show significant commercial differentiation from one another. It is possible, of course, that by extensive promotion private label brands could achieve consumer acceptance equivalent to that of a premium brand. In that situation, the products would still be economically different under the market test of § 2 (a) elucidated in this opinion, since the relevant comparison would exclude promotional efforts by persons other than the producer of the premium brand. Thus, promotional activities by customers of Borden in the present case could not affect the determination of "like grade and quality" with regard to sales by Borden. Cf. Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394, 406–407 (1965).

[3] Cf. Chamberlain, The Theory of Monopolistic Competition, 56 (8th ed. 1962):

"A general class of products is differentiated if any significant basis exists for distinguishing the goods (or services) of one seller from those of another. Such a basis may be real or fancied, so long as it is of any importance whatever to buyers, and leads to a preference for one variety of the product over another. Where such differentiation exists, even though it be slight, buyers will be paired with sellers, not by chance and at random (as under pure competition), but according to their preferences.

"Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade-marks; trade names; peculiarities of the package or container, if any; or singularity in quality, design, color, or style . . . . In so far as

for Borden brand milk reflects the consumer's awareness, promoted through advertising, that these commercial attributes are part and parcel of the premium product he is purchasing.[4] The record in the present case indi-

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these and other intangible factors vary from seller to seller, the 'product' in each case is different, for buyers take them into account, more or less, and may be regarded as purchasing them along with the commodity itself."

See also Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L. J. 1165, 1181 (1948):

". . . The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? . . . The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it."

[4] For example, a grocer testified in the proceedings before the Commission that:

"People are going into a grocery store to pick up groceries, the majority of the people buy something that is advertised that they have known for years or heard of for years or see highly advertised. They know it is a good product, they know it is fancy merchandise or best quality."

Another grocer testified that:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them don't want anything except Pet.

"Q. They don't care what price—

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else.

"Q. You couldn't give her something else, could you?

"A. I doubt if I could."

cates that wholesale purchasers of Borden's private label brands continued to purchase the premium brand in undiminished quantities. The record also indicates that retail purchasers who bought the premium brand did so with the specific expectation of acquiring a product of premium quality.[5] Contrary to the Court's suggestion, *ante*, p. 7, this consumer expectation cannot accurately be characterized as a misapprehension. Borden took extensive precautions to insure that a flawed product did not reach the consumer.[6] None of these precautions was taken for the private brand milk packed by Borden.[7] An important ingredient of the premium brand inheres in the consumer's belief, measured by past satisfaction and the market reputation established by Borden for its products, that tomorrow's can will contain the same

[5] The results of a house-to-house survey conducted for Borden by National Analysts, Inc., indicated that consumers selected Borden's premium brand because of its superior quality. Comparable studies have reached a similar conclusion. Cf. "Mom Feels Quality, not Ad Cost, Makes Brand Item Costlier, 'Good House' Reports," Advertising Age, Dec. 7, 1964, p. 30.

[6] Borden's Food Products Division maintained a staff of field representatives who inspected code-datings on cans of Borden brand milk in retail stores, in order to insure that older milk was sold first off the retailer's shelves. A witness for Borden testified that the principal dangers of long storage were discoloration of the milk, precipitation of calcium and other minerals, and separation and hardening of fat from the milk. As a further precaution against sales of defective milk, Borden dispatched its milk to wholesalers and retailers under a first-packed, first-shipped rotation plan that occasionally involved high-cost shipments from distant plants or warehouses. In addition, before shipment from a cold storage warehouse, Borden "tempered" its premium brand milk in order to prevent condensation on the cans, which might have resulted in rust to the cans and damage to the labels.

[7] As counsel for the respondent candidly stated on oral argument to the Court, "The difference as to the private label brand packed by Borden is that, as to that product, the Borden Company washes its hands of it at the factory door."

premium product as that purchased today. To say, as the Court holds, that these and other intangibles, which comprise an important part of the commercial value of a product, are not sufficient to confer on Borden's premium brand a "grade" or "quality" different from that of private label brands is to ignore the obvious market acceptance of that difference. "[C]ommercially the 'advertised' brands had come in the minds of the public to mean a different grade of milk. The public may have been wrong; . . . it may have been right; . . . But right or wrong, that is what it believed, and its belief was the important thing." *Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599, 600 (D. C. S. D. N. Y.) (opinion of L. Hand, J.).[8]

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[8] The Court's suggestion that the commentators are about equally divided upon the issue before us is somewhat misleading. It is true that the members of the Attorney General's National Committee to Study the Antitrust Laws, Report, pp. 156–159 (1955), were sharply divided as to whether significant consumer preferences should be taken into account under the "like grade and quality" test of § 2 (a). However, the very brief discussions of "like grade and quality" in Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 39 (2d ed. 1959); Patman, Complete Guide to the Robinson-Patman Act 34–35 (1963); and Edwards, The Price Discrimination Law 31, 463–464 (1959), are not addressed to the relevance of significant consumer preferences, and the minimal discussion in Seidman is at best ambiguous, Price Discrimination Cases, reprinted in 2 Hoffmann's Antitrust Law and Techniques, 409, 427–428 (1963). Those cursory treatments go no further than the view, with which I wholly agree, that no blanket exemption from § 2(a) is available for private label brands. But that view in no sense disposes of the concrete issue presented in this case. Commentators who have in fact focussed on the significance of consumer preferences uniformly favor inclusion of commercial acceptance in the test of "like grade and quality." Rowe, Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act, 66 Yale L. J. 1 (1956); Price Discrimination under the Robinson-Patman Act 62–76 (1962); Cassady and Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of § 2 (a) of the

The spare legislative history of the Robinson-Patman Act is in no way inconsistent with a construction of § 2 (a) that includes market acceptance in the test of "like grade and quality." That history establishes no more than that mere differences in brand or design, unaccompanied by any genuine physical, chemical, or market distinction, are insufficient to negate a finding of "like grade and quality" under § 2 (a).[9] Nothing that I have found in the legislative history speaks with precision to the sole issue before us here, the application of § 2 (a) to physically or chemically identical products that are in fact differentiated by substantial market factors.[10]

Robinson-Patman Act, 30 So. Calif. L. Rev. 241 (1957); Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394 (1965).

[9] The Court's suggestion, *ante*, p. 7, that a difference in label alone would exclude the reach of § 2 (a) if a market test were accepted for "like grade and quality" is no part of the present case and has never been offered as a serious interpretation of § 2 (a). Nor is there any issue raised here as to whether, under a market test of § 2 (a), a dubious pricing and branding policy adopted by a seller could "validate itself" and escape the Act by creating precarious distinctions in grade or quality. The price differential between Borden's premium and private label brands is concededly grounded upon a legitimate and stable market preference for the premium product. Moreover, the Commission's willingness to engage in the exhaustive analysis of injury to competition and cost justification under its "physical identity" test of § 2 (a) demonstrates that the Commission's resources would be more than adequate to determine the level of commercial preference sufficient to negate a finding of "like grade and quality" under a market test of § 2 (a).

[10] Certain general language in the congressional reports may be taken, however, as supporting the interpretation that market factors are relevant in the construction of § 2 (a). The Report of the House Committee on the Judiciary stated that the general object of the bill was "to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences in their business*

Neither the remarks of Representative Patman, *ante*, p. 6, nor the letter of Mr. Teegarden, *ante*, p. 4, n. 4, supports the Court's conclusion that Congress intended physical and chemical identity to be the sole touchstone of "like grade and quality." Aside from the obviously casual nature of Mr. Patman's reply to the question concerning the effect of the Act on private label brands,[11] his remarks go embarrassingly further than the circumspect reading sought to be given them by the Court. On its face, Mr. Patman's statement makes the blanket assertion that all products of the same quality must be sold at the same price. As thus stated, premium brands would have to be sold at the same price as private label brands, regardless of injury to competition, cost justification, or other available defenses under the Act. These undifferentiated remarks are therefore of little assistance in the determination of congressional intent. Far from supporting the Court's interpretation of § 2 (a), the final paragraph of the Teegarden letter suggests that Mr. Teegarden considered the bill to have no effect on a premium brand producer's decision to furnish private label brands to purchasers, so long as the private label brands were made available on the same terms to all purchasers. Mr. Teegarden's concern was with the prevention of discrimination between purchasers on the basis of artificial differences in brand.[12] That same concern, and no more,

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positions. . . ." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 7. (Emphasis added.) The Report of the Senate Committee on the Judiciary is phrased in substantially the same language. S. R. Rep. No. 1502, 74th Cong., 2d Sess., p. 3.

[11] The remarks of Representative Patman were even more offhand than the opinion of the Court indicates. Prefacing the portion of his remarks quoted by the Court, Mr. Patman said, "I only have a very short time, and I must finish my statement. I have not time to discuss that feature . . . ."

[12] The predominant concern of Congress in enacting the Robinson-Patman amendments to the Clayton Act was to abolish the notorious

is all that may legitimately be read into the rejection by Congress of the proposal to add "and brands" to the "like grade and quality" provision in the bill. By rejecting that proposal, it can be inferred only that Congress contemplated "no *blanket* exemption . . . for 'like' products which differed *only* in brand . . . , leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation." Rowe, Price Discrimination under the Robinson-Patman Act, 65 (1962).

The references in the legislative hearings and the House Committee Report to the Commission's decision in *Goodyear Tire and Rubber Co.*, 22 F. T. C. 232, are equally inconclusive on the relevance of commercial acceptance to the determination of "like grade and quality." The striking aspect of that case is that Goodyear *conceded* that the differently branded tires involved in the proceeding were of like grade and quality, 22 F. T. C., at 290. Moreover, the tires purchased by Sears, Roebuck & Co. from Goodyear and sold under Sears' "All State" label were advertised by Sears as obtained from "the leading tire manufacturer" and "the world's foremost tire manufacturer," so that the market independence of Sears' private brand was compromised. *Id.*, at 295, 297.

The other administrative precedents relied on by the Court also fail to establish any consistently settled inter-

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price discriminations that infected the post-Depression economy, especially the blanket immunity then available for quantity discounts under § 2 of the Clayton Act. An obvious commercial evil at the time was the widespread practice of offering private label brands to favored customers at rates substantially lower than the rates offered to competing purchasers. The abortive attempt, vigorously opposed by Mr. Teegarden, to introduce "and brands" into the "like grade and quality" provision would have left that evil completely unremedied. Cf. 80 Cong. Rec. 8234–8236 (rejection of amendments proposing the addition of "and design" and "purchased under like conditions" to the "like grade and quality" clause).

pretation by the Federal Trade Commission that physical identity is the sole touchstone of "like grade and quality." Those decisions singularly fail to focus on the significance of consumer preference as a relevant factor in the test of grade and quality.[13] Moreover, the Commission has itself explicitly resorted to consumer preference or marketability to resolve the issue of "like grade and quality" in cases where minor physical variations accompany a difference in product brand.[14] The

[13] In *Hansen Inoculator Co*, 26 F. T. C. 303, and the two *United States Rubber Co.* cases, 28 F. T. C. 1489; 46 F. T. C. 998, the finding of "like grade and quality" was either conceded by the respondent or not challenged. In addition, in *Hansen Inoculator*, there was significant evidence that the private label product was in fact trading on the reputation of the premium product. Further, in *Hansen Inoculator*, as in *Page Dairy Co.*, 50 F. T. C. 395, it is doubtful that even the labels on the two products were distinguishable. In *Whitaker Cable Corp.*, 51 F. T. C. 958, the resale prices of both products were identical, so that no commercial preference could have been proved in any event. Finally, in the first *U. S. Rubber* case and in *Whitaker Cable Corp.*, there was substantial discrimination by the seller between various purchasers of the private label brands. In setting aside the order of the Commission in the present case, the Court of Appeals for the Fifth Circuit emphasized that in none of these cases was there any showing that the brand names affected the market price of the products sold.

[14] *Universal-Rundle Corp.*, CCH Trade Reg. Rep. Transfer Binder ¶ 16948, at pp. 22003–22005 (F. T. C. Dkt. 8070, June 12, 1964) (differences in plumbing fixtures); *Quaker Oats Co.*, CCH Trade Reg. Rep. Transfer Binder ¶ 17134, at p. 22215 (F. T. C. Dkt. 8112, Nov. 18, 1964) (differences in flour blends). Compare *E. Edelmann & Co.*, 51 F. T. C. 978 (differences in automobile replacement parts); *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985, aff'd 187 F. 2d 919 (C. A. 5th Cir.) (differences in size of juice cans); *Champion Spark Plug Co.*, 50 F. T. C. 30 (differences in insulator and "ribs" of spark plugs). Cf. Comment, Like Grade and Quality: Emergence of the Commercial Standard, 26 Ohio State L. J. 294, 296–302 (1965). The Commission appears at one time to have held that brand identity may create a presumption of "like grade and quality," regardless of the existence of physical differences between

caprice of the Commission's present distinction thus invites Borden to incorporate slight tangible variations in its private label products, in order to bring itself within the Commission's current practice of considering market preferences in such cases.

The Commission's determination of "like grade and quality" under § 2 (a) in this case is seriously inconsistent with the position it has taken under § 2 (b) in cases where a seller has presented the defense that he is in good faith meeting the equally low price of a competitor. The Commission decisions are clear that the "meeting competition" defense is not available to a seller who reduces the price of his premium product to the level of nonpremium products sold by his competitors. The Commission decisions under § 2 (b) emphasize that market preference must be considered in determining whether a competitor is "meeting" rather than "beating" competition. In *Standard Oil Co.*, 49 F. T. C. 923, 952, the Commission put it baldly:

> "[I]n the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor." [15]

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the products. *General Foods Corp.*, 52 F. T. C. 798, 817; *Atalanta Trading Corp.*, 53 F. T. C. 565, 571. In setting aside the Commission's order in *Atalanta*, the Court of Appeals for the Second Circuit stated that "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded." *Atalanta Trading Corp.* v. *FTC*, 258 F. 2d 365, 371. In a footnote to that opinion, the Court of Appeals indicated that price differences were among the distinctions to be considered. *Id.*, at 371, n. 5. Cf. Rowe, Price Discrimination under the Robinson-Patman Act, 71–72 (1962).

[15] See also *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 396–397: "To accept [the contrary] proposition would mean that any seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not

Could the Commission under § 2 (b) now prevent Borden from reducing the price of its premium milk to the level of private-label milk? I can see no way that it could, short of maintaining a manifestly unstable equilibrium between § 2 (a) and § 2 (b). By adopting a keyhole approach to § 2 (a), the Court manages to escape resolution of the question, but it does so at the cost of casting grave doubt on what I had regarded as an important bulwark of § 2 (b) against a recognized competitive evil.

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undercut the prices of competitors"; *Anheuser-Busch, Inc.*, 54 F. T. C. 277, 302: "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market . . . . The test in such a case is not necessarily a difference in quality, but the fact that the public is willing to buy the product at a higher price in a normal market"; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH Trade Reg. Rep. Transfer Binder ¶ 16,800, at p. 21755 (F. T. C. Dkt. 7634, Feb. 10, 1964): "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of . . . intense public demand, normally commands a price higher than that usually received by sellers of competitive goods"; *Standard Brands, Inc.*, 46 F. T. C. 1485, 1495; *Gerber Products Co.* v. *Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920, 921–922 (D. C. S. D. N. Y.). Cf. *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (C. A. 2d Cir.). In the present case, the Court of Appeals for the Fifth Circuit specifically refused to "approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case." 339 F. 2d 133, at 139. See the comment of Commissioner Mason: "First the Commission finds you guilty of price discrimination by disregarding popularity of goods, and finds the grade and quality of the commodities in question are the same; then they knock out your meeting of competition defense because your goods are more popular than others, even if the commodities in question are of like grade and quality." Discriminate in Price between Different Purchasers of Commodities of Like Grade, Quality and Popularity, Proc. Am. Bar Assn. Section of Antitrust Law 82, 91–92 (Aug. 1953). Cf. Eine Kleine Juristische Schlummergeschichte, 79 Harv. L. Rev. 921, 928–929 (1966).

The Court gives no substantial economic justification for its construction of § 2 (a).[16] The principal rationale of the restriction of that section to commodities of "like grade and quality" is simply that it is not feasible to measure discrimination and injury to competition where different products are involved. That rationale is as valid for economic as for physical variation between products. Once a substantial economic difference between products is found, therefore, the inquiry of the Commission should be ended, just as it is ended when a substantial physical difference is found.

In spite of the assertion of the Attorney General's Report quoted by the Court, it is unlikely that economic differences between premium and private label brands can realistically be taken into account by the Commission under the "injury to competition" and "cost justification" provisions of § 2 (a).[17] Even if relevant cost

[16] The Court's brief discussion of the adverse economic effect of the Fifth Circuit's ruling is concerned primarily with the supposed injury to secondary line competition. The present proceeding arose as the direct result of the primary line injury caused to Midwest packers of private label evaporated milk when Borden expanded its plants in Tennessee and South Carolina to include private label operation, but the opinion of the Court nowhere discusses such competition.

[17] It is not clear that the "injury to competition" and "cost justification" issues will be reached on the remand. As the opinion of the Court suggests, *ante*, p. 9, the existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end, and no issue of injury to competition or cost justification under § 2 (a) is reached. Nothing in *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimi-

data can be agreed upon, the cost ratio between Borden's premium and private label products is hardly the most significant factor in Borden's pricing decision and market return on those products. Moreover, even if price discrimination is found here, its effect on competition may prove even more difficult to determine than in more conventional cases of price discrimination under § 2 (a). Cf. *FTC* v. *Morton Salt Co.*, 334 U. S. 37; *United Biscuit Co.* v. *FTC*, 350 F. 2d 615 (C. A. 7th Cir.).

The threat presented to primary line competition by Borden's distribution of premium and private label brands is unclear. No allegation was made that Borden has used its dominant position in the premium brand market to subsidize predatory price-cutting campaigns in the private label market. Borden packs its private label brands for national distribution, so that this case is essentially different from those in which geographical price discriminations are involved. Further, Borden's private label brands are aimed in part at a different, more price-conscious class of consumer. Because relevant economic factors differ in the premium and private label markets, conventional notions of price discrimination under the Robinson-Patman Act may not be applicable.[18] More important, Borden's extensive distribution of its private label brands has introduced significant low-cost competition for Borden's own premium product. Thus, the large retail chains and cooperative buyer organizations that are Borden's chief private label customers represent a significant source of countervailing power to the

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nation within the meaning of § 2 (a) can be made out. *Boss Mfg. Co.* v. *Payne Glove Co.*, 71 F. 2d 768, 770–771 (C. A. 8th Cir.); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 21 (2d ed. 1959); Rowe, Price Discrimination under the Robinson-Patman Act, *supra*, at 97–99.

[18] Cf. Adelman, Price Discrimination as Treated in the Attorney General's Report, 104 U. Pa. L. Rev. 222, 228–230 (1955).

oligopoly pattern of evaporated milk production. The rise of this sort of competition is well known in other parts of the food industry.[19] In these circumstances, the anticompetitive leverage against primary line competition available to Borden through its private label production is sharply curtailed. There is, therefore, no real resemblance in this case to the serious discriminatory practices that the Robinson-Patman Act was enacted to prevent.

The potential economic impact of Borden's distribution of private label brands on secondary line competition is equally ambiguous. It is true that a market test of "like grade and quality" would enable Borden, so far as § 2 (a) is concerned, to make private label brands selectively available to customers of its premium brand. Not all wholesale and retail dealers who carry Borden's premium brand would be able, as of right, to take advantage of Borden's private label production. But the Commission could still apply § 2 (a) with full force against discriminations between private label customers. And the Government could still invoke § 2 of the Sherman Act or § 5 of the Federal Trade Commission Act to deal with other forms of price discrimination by Borden against its customers or competitors.

Under the Court's view of § 2 (a), Borden must now make private label milk available to all customers of its premium brand.[20] But that interpretation of § 2 (a) is

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[19] See Staff Report of the Federal Trade Commission, Economic Inquiry into Food Marketing, Part II, The Frozen Fruit, Juice and Vegetable Industry (1962); Jordan, *supra*, at 413–417.

[20] The Commission concedes that there is no evidence in the record that Borden refused to sell private label milk to any customer who specifically requested it. Borden's private label business in the period covered by these proceedings was substantial. In 1957, Borden sold 4,300,000 cases of its premium brand evaporated milk and 1,100,000 cases of private label milk (government and export

hardly calculated to speed private label brands to the shelves of retailers. To avoid supplying a private label brand to a premium brand customer, Borden need only forego further sales of its premium brand to that customer. It is, therefore, not unlikely that the Court's decision will foster a discrimination greater than that which it purports to eliminate, since retailers previously able to obtain the premium Borden brand but not a private label brand, may now find their access to the premium brand foreclosed as well.

In *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 63, this Court cautioned against construction of the Robinson-Patman Act in a manner that might "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." Today that warning goes unheeded. In the guise of protecting producers and purchasers from discriminatory price competition, the Court ignores legitimate market preferences and endows the Federal Trade Commission with authority to disrupt price relationships between products whose identity has been measured in the laboratory but rejected in the market place. I do not believe that any such power was conferred upon the Commission by Congress, and I would, therefore, affirm the judgment of the Court of Appeals.

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business excluded); net sales of these products were $27,600,000 and $5,700,000, respectively. A major source of Borden's private label business was provided by cooperative associations of wholesalers and retailers, so that, in fact, there was an opportunity for large numbers of small retailers to compete in the sale of private label brands of evaporated milk obtained from Borden. One such group, whose purchases accounted for 11% of Borden's private label volume in 1957, had more than 1,000 retailer members. Not all retailers, however, availed themselves of the opportunity to market private label milk. One wholesaler testified that, a year after his private label brand had been offered to the 600 retail grocers in his service area, only 50 of the grocers had become regular customers.